17343.

This arbitration was had under the provisions of the "European Assurance Society Act" 1872 which was chapter CXLIV of the Private acts of Parliament

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THE

EUROPEAN ASSURANCE ARBITRATION.

(BEFORE LORD WESTBURY.)

REPORTED BY R. MARRACK, ESQ., BARRISTER-AT-LAW.

Tuesday, Oct. 22.

RUTHIN GUARDIANS' CASE.

Guarantee assurance company—Guarantee policy—Claim on policy against a reserved fund—Proprietors' fund—Assurance fund—Interpretation of the word "affect."

There was a section in the European Assurance Society Arbitration Act, giving the arbitrator power to apply or distribute or otherwise deal with the assets of the European Society and the amalgamated companies, including any guarantee fund, indemnity fund, or other special fund; but the section contained a proviso with reference to a fund of the European Society, set apart and called the "Reserved Fund," that "nothing herein contained shall affect the Reserved Fund, and the application thereof under the recited Act;" the recited Act being the European Society's Act of Parliament. This proviso was interpreted to mean that "nothing herein contained shall give power to the arbitrator, or shall enable the arbitrator to give to the Reserved Fund, directly or indirectly, any application which is inconsistent with the application directed by the recited Act."

Under an assurance company's deed of settlement, its assets were separated into two distinct funds; one, the "Proprietors' Fund," consisting of the moneys paid up on the shares, and the other, the "Assurance Fund," consisting of the premiums. Under its Act of Parliament, a fund was to be set apart out of its assets, and called the "Reserved Fund," and it was provided that the "Reserved Fund shall be liable after the Assurance Fund is exhausted, but not before, to make good the guarantees granted in pursuance of the Act." Before the winding-up of the company, a sum of money became due on a guarantee policy, one of the conditions of which was that the general fund and property of the company for the time being, and the subscribed capital, should alone be liable to answer and make good any claim on the policy. In the winding-up the policy holder claimed to be entitled to be paid immediately out of the Reserved Fund, so as not to have to wait for the declaration of a dividend out of the general assets before claiming against the Reserved Fund. The claim was grounded on the fact that there was no longer any Assurance Fund, and that the Reserved Fund was sufficient to defray all claims on it.

Held, that the Reserved Fund was a collateral security, but that recourse was not to be had to it till the principal fund was exhausted. And this principal fund was the property of the company, applicable to the payment of its debts. The distinction between the Proprietors' Fund and the Assurance Fund was disregarded, the assets of the company, under whatever name they are entered, being applicable to the payment of the debts. Thus it was held that the policy-holder was entitled to prove for the amount due against the general assets of the company, and to receive a dividend thereon. After receipt of such dividend, liberty to apply again for the payment of the residue out of the Reserved Fund.

THIS was a question as to whether the claimants on a policy were entitled to immediate payment out of a reserve fund.

The European Assurance Society was established in 1854, with the name of "The People's Provident Assurance Society," under a deed of settlement, for the purpose, *inter alia*, of granting assurances guaranteeing the integrity of persons in situations of pecuniary trust and confidence.

The deed provided that two separate funds should be formed, to be called respectively "The Proprietors' Fund" and "The Assurance Fund," the former to consist of all moneys arising from the payment made upon the shares, and the latter of the produce of premiums and profits arising from policies. And there was a provision that all charges, claims, demands, disbursements, and expenses of every kind and description whatsoever to be incurred in the conduct, management, and carrying on of the business of the society were to be paid out of the "Assurance Fund," with a proviso that, if this fund should at any time be insufficient to defray these expenses, the sum required was to be advanced out of the Proprietors' Fund, and the advance, with interest thereon, returned to the Proprietors' Fund as soon as it was convenient.

In 1859, the "European Assurance Society's Act 1859" was passed, changing the name of the society to its present name. Subject to the provisions of this Act, the society was to continue established and be regulated under and according to the deed of settlement. The Act contained a provision that the Poor Law Board and all guardians

and other officers acting in the administration of the laws for the relief of the poor might accept, instead of any bond or other security of any person or persons required to be given by any officer accountable to any guardians or other such officers, the guarantee or security of the European Society Before issuing any such bond or policy of guarantee the society was to set apart out of its assets or income the sum of 20,000*l.* as a "Reserved Fund," and annually to add 2000*l.* thereto, until the Reserved Fund should amount to 100,000*l.* And it was further provided that

Sect. 20. The Reserved Fund shall be liable, after the Assurance Fund of the society is exhausted, but not before, to make good the guarantees or securities of the society granted in pursuance of this Act, and for no other purpose. And all sums from time to time taken from the Reserved Fund for the purpose of making good any such guarantees or securities shall, as soon as possible, be replaced from the assets or income of the society, or both, so as to keep the Reserved Fund always up to the amount thereof required by this Act; and any sums from time to time appropriated or carried to the Reserved Fund may be taken either wholly or in part from the Proprietors' Fund and the Assurance Fund of the society, or either of them, as the directors of the society think fit.

20,000*l.* was duly set apart to form the Reserved Fund, and additions had been made thereto from time to time. The Reserved Fund now consisted of 34,332*l.* 18*s.* 7*d.* Consolidated Three per Cent. Annuities, standing in the names of four trustees.

In 1870 the society granted to the guardians of the poor of the Ruthin Union a policy guaranteeing to the limit of 500*l.* the integrity of S. Owen, who had been appointed assistant overseer for this union; the policy containing a proviso that "the general funds and property for the time being, and the subscribed capital according to the deed or deeds of settlement of the society, should alone be liable to answer and make good all claims in respect of the policy." S. Owen subsequently became a defaulter, and the amount of the loss occasioned by his default was certified on the 3rd July 1871 by the poor law auditor of the district, in accordance with the provisions of the policy, to be 241*l.* 2*s.* 7½*d.* and interest thereon.

On the 10th June 1871 a petition was presented to wind-up the society. Pending the proceedings on this petition the sum claimed on the policy was not paid; and on the 21st Oct. 1871 the Ruthin Guardians filed a bill in Chancery praying for the payment of the sum out of the "Reserved Fund." The proceedings in the suit were stayed by the order to wind-up the society on the 12th Jan. 1872.

The Ruthin guardians now claimed that they were entitled to have this sum paid primarily out of the "Reserved Fund," and that, inasmuch as the fund would be sufficient to defray all claims that could be made on it, they were entitled to immediate payment.

In the European Assurance Society Arbitration Act 1872 there was the following section:

Sect. 7. The arbitrator shall have power, for the purposes of any scheme or any other purpose of the arbitration, to get in, or direct the getting in, and to apply or distribute, or direct the application or distribution of, or to otherwise deal with, all or any part of the assets of any of the several absorbed or scheduled companies, including any guarantee fund, indemnity fund, or other special fund belonging to, or held in trust for, or established for any purpose of or relating to any of those companies, and all matters in question as between all parties to any suit or proceeding pending at the passing of this Act relating to any such fund as aforesaid, and every such suit or proceeding shall be comprised among the matters by this Act referred to arbitration: Provided always that nothing herein contained shall affect the Reserved Fund, and the application thereof under the recited Act [the recited Act being the European Assurance Society's Act 1859].

Benjamin, Q. C. and *H. M. Jackson* for the applicants.—If a dividend be taken first out of the Assurance Fund, there would be merely a circuity, for, the remainder being taken out of the Reserved Fund, the surplus of that fund must ultimately go back, and form part of the general assets of the society.

Lord Westbury.—If I acceded to this application, should I not be giving a different destination to the Reserved Fund from the destination given to it by the society's Act of Parliament? The proviso in the 7th section of the Arbitration Act lies in your way—it bars you at the threshold; you must get over the bar before I can listen to the application. It is a most unfortunate proviso, because at the first blush of it the conclusion would be that I could not listen to your application.

Benjamin.—The proviso means, you may *effect* the application of the fund, you may not *affect* it; you may carry out the original scheme, you may not impair it. The word "affect" is used not with its strictly etymological meaning, but with its meaning in ordinary language—impair, alter, change adversely, injure.

Lord Westbury.—Or improve.

Benjamin.—If this be the interpretation of the Act then the Assurance Fund being at the present time exhausted, the policy is to be paid out of the Reserved Fund.

Lord Westbury.—All that may be quite right, supposing that the concern is a going concern, and that you come with a policy and with your certificate, and you say "250*l.* is due to me." You apply to the directors to pay it out of the Assurance fund; the directors say, "The Assurance Fund is *nil.*" Then you say, "Pay me out of the Reserved Fund." Possibly that was the intention of the Act of Parliament. But how are you in a condition to satisfy me that there is not at this moment, or was not at the time of the winding-up order, any money standing to the credit of the Assurance Fund, seeing that there would be brought into the Assurance Fund all the unpaid capital of the shareholders of the company, which is now the subject of a call? All that would fall within the compass of the Assurance Fund; all that is still to be collected. Then your Assurance Fund cannot be exhausted.

Benjamin.—The Assurance Fund that is to be collected is not exhausted, but I say that the meaning of the section is not the sums that may be coming in hereafter, but the cash in hand. I ought not to be told to wait. The application of the Reserved Fund before the Arbitration Act, and before the winding-up, was in immediate payment. Suppose this company to be a going concern. We go with a policy; does your lordship think that under the 20th section of the Act the company, as a going concern, could say to a guarantee policy holder, "We have no Assurance Fund now, but we shall have hereafter, and you must wait till we get it;" because I think that that is really the question.

Lord Westbury.—That is not the condition of things now. The company has been put a stop to, and the whole of its assets will be applicable to the purposes to which the Assurance Fund is dedi-

cated, and all that you can have now will be a proportionate part of those assets in payment of your debt, when it is ranked with other debts. I am afraid that must be so, and that I could not possibly determine that there is any other meaning to be given to the Act of Parliament. You see, I doubt very much whether I can interpret the Act of Parliament. It is a very difficult thing altogether. It is the fault of all our Acts of Parliament now, that words are stuck in at the end without any reference to their congruity with what precedes them or follows them, and then the courts are left to the hopeless task of deriving some regular purpose out of inconsistent words. Now, suppose I go with you so far as to hold that the true interpretation of this proviso is this:—"Provided always that nothing herein contained shall give power to the arbitrator, or shall enable the arbitrator, to give to the Reserved Fund, directly or indirectly, any application which is inconsistent with the application directed by the recited Act." Suppose I so interpret the words—and I assume a very considerable judicial power, in giving that interpretation of the words; still I will do so, for any other meaning would be irrational, because it would lead to this difficulty and this sort of *non-plus* that I should be in—for this fund stands in the way of so many applications—that I should have the whole of that subject excepted from my jurisdiction altogether if I could not deal with the Reserved Fund, subject only to the limit of not imposing on it any kind of application that was in the smallest degree inconsistent with the language of the society's Act of Parliament. It is now reduced to the question, can we say that the Assurance Fund is already exhausted, or that there is no Assurance Fund?

Benjamin.—Under the deed of settlement the Proprietors' Fund and the Assurance Fund are two distinct funds, and it is premiums only that go to make up the Assurance Fund; thus there is no Assurance Fund. [Lord Westbury.—If the Proprietors' Fund was to be the feeder of the Assurance Fund, then you cannot say that there is no Assurance Fund, until you find that there is no water in the well of the Proprietors' Fund.] One fund was not to be supplied out of another fund. [Lord Westbury.—Suppose there was no winding-up order, and that a policy became due and payable, do you mean to say that it was to be paid out of the Assurance Fund exclusively?] If there was an Assurance Fund, it would be paid out of that; but if there was none, there is nothing in the Act to relieve the shareholders from paying up.

Lord Westbury.—All these things are operative only as between the directors and the shareholders, but as between them and the external creditors they operate nothing. The whole funds of the society, whether you enter them under one heading or another in your book-keeping as between you and the shareholders, are applicable to the payment of the external creditors. It could not mean that you were to exhaust only that which might be entered under the particular heading of the Assurance Fund; it must have meant what is expressed in the latter part, namely, that that fund was to be replaced when applied in your favour out of the Assurance Fund or the Proprietors' Fund without distinction.

Benjamin.—I should not contend if the company had in its hands proprietors' funds as a going concern, and when I applied for the payment of the policy, answered "I have no assurance fund, only proprietors' money, and I will not pay you," that it would not be in the power of the court to force them to pay out of that fund. But I should say that these provisions, appropriate as they are to the action of the directors on the shareholders, and of the members of the society *inter se*, are not to affect creditors beyond their precise language, and that we, as creditors, have a right to come in and say, "Here, by the provision of the Legislature, is a fund which is created as a collateral security to pay us; the principal debtor does not pay us; here is the money for us; we ask you to give us the money specially pointed out as the source into which we might put our hands and take out what belongs to us;" and the other side are not entitled to say, "You cannot do it at all; wait and see if you can be paid in some other way; we admit we are insolvent."

Napier Higgins, Q.C. and *Montague Cookson* appeared for the official liquidators of the European Society, and *Hemming* for the Treasury, but they were not called on.

Lord Westbury.—Mr. Benjamin has used an argument exactly applicable to the subject. This guarantee fund was originally declared to be a collateral security; it was to be a surety fund, to which you might have recourse, but to have recourse only on the ordinary terms of first exhausting the principal fund. Now the principal fund is the property of the company applicable to the payment of its debts. I wholly disregard the words "Proprietors' Fund" or "Assurance Fund," because, whether the assets of the company are entered under one heading or whether they are entered under another, they are applicable to the payment of debts, and the substance of the whole thing is this, that you have got a special surety fund, and that you are not to touch that surety fund until you have exhausted the principal fund. The principal fund is the general property of the company applicable to the payment of debts. Now I do not mean to prejudice your security, but I shall propose, subject to what I may hear, to make an order of this kind: Declare first the true construction of the proviso in the manner that I have already expressed; declare that you are entitled to prove the debt certified to be due as the amount of Owen's deficiency, that you are entitled to prove that against the assurance company and to receive the dividends rateably thereon. Let the rest of the application stand over until after such proof of receipt, with liberty to apply again. I think in that way I shall not, either directly or indirectly, alter the application of the guarantee fund under the Act of Parliament. But that is the substance of the thing. We must not be hoodwinked by all this machinery, which is introduced only, and available only, as between the directors and the shareholders; but we must be guided by the original purpose for which this Reserved Fund was created, which was to give to Government and other public functionaries a perfect security that the policies would be ultimately payable.

The costs of the application were allowed; but with regard to the costs of the suit, Lord Westbury said that, although there was great delay between the presentation of the petition and the court making the winding-up order, yet the guardians ought to have awaited the time when the court might deem it necessary to make an

order. There was no justification for the premature bill, and the costs in Chancery would not be allowed.

Solicitors: *Rooks, Kenrick* and *Harston*, for the applicants; *Mercer* and *Mercer*, for the official liquidators of the European Society.

Tuesday, Oct. 22.

OPORTO MINING COMPANY'S CASE.

Assurance company—Guarantee policy—Winding-up—Interest on sum payable on policy.

Where a sum of money was to be payable on a guarantee policy, on the Vice-Chancellor's chief clerk making a certificate as to the sum due in case of a defalcation, and on a defalcation occurring, the date of the certificate was subsequent to the presentation of a successful petition to wind-up the assurance company,

Held, that the policy holder was not entitled to prove for interest on the sum certified from the date of the certificate.

THIS was a claim on a guarantee policy, and the chief question involved was whether interest was payable on the sum claimed.

In 1868 the Oporto Mining Company was ordered to be wound-up, and E. Addis was appointed official liquidator. The European Society was approved of by the Vice-Chancellor as his surety. And accordingly by a bond dated the 8th Aug. 1868, the European Society became bound unto Lord Romilly and Sir J. Stuart in the sum of 1000*l.*, subject to a condition for defeating the bond if Addis or his heirs, executors, &c., should duly account for what he should receive or become liable to pay as such official liquidator, and pay the same, with a proviso that a certificate of the Vice-Chancellor's chief clerk of the amount which Addis should as such official liquidator be liable to pay, or should not have paid, was to be conclusive evidence of the truth of the contents of the certificate, and that the bond had become forfeited to the amount of the sum so stated, and that the sum should be a charge on the funds and property of the society.

Edward Addis subsequently misapplied moneys received by him, and in Nov. 1871 the Vice-Chancellor's chief clerk certified that 761*l.* 12*s.* 9*d.* was due on the bond.

As in the *Ruthin Guardians'* case (*ante*, p. 1), the present official liquidator of the Oporto Mining Company claimed to be entitled to immediate payment out of the reserved fund. He further claimed that in any payment out of this fund he, with the others who have matured claims, will be entitled to priority over the general creditors of the society, and over creditors having contingent claims against the fund. This question, however, was not considered; the only question considered was whether he was entitled to prove for interest on the sum from the date of the chief clerk's certificate.

The date of the presentation of the petition to wind-up was the 10th June 1871.

Whitehorne, for the applicant, referred to

Re Hatfield Patent Cask Company, 11 W. R. 971; 2 N. R. 502;

Re State Fire Insurance Company, Times Assurance Company's case, 2 H. & M. 722.

Montague Cookson, for the official liquidators of the European Society, was not called upon.

LORD WESTBURY. — Here the debt is not ascertained, and does not carry interest until after the proceedings for the winding-up. When the debt did arise, it became due by reason of the certificate of the chief clerk on the 11th Nov. 1871. There was no person from whom the debt could be demanded, for no person had the power at that time to pay it. The debt, therefore, was not withheld from you by reason of the refusal or the negligence of any person liable to pay the debt. I cannot, therefore, give you interest, which would interfere altogether with the distribution of the assets. In all other respects your case will be governed by the decision in the *Ruthin Guardians'* case (*sup.*). I think you must have your costs here.

Henming, for the Treasury.—The Crown has not been served with this case. If the order is to embody the order in the other case, it is necessary that the Treasury, who have a veto over any such matters with regard to the Reserved Fund, should be served with this case as well as the other.

LORD WESTBURY.—What have the Treasury to do with it? I am not desirous of encouraging the Treasury to come into court when they are not wanted.

Solicitors: *Lewis, Munns*, and *Longden*, for the applicant; *Mercer* and *Mercer*, for the official liquidators of the European Society.

Wednesday, Oct. 23.

Re BRITISH NATION INDEMNITY CLAIMS.

Life assurance company—Amalgamation of companies—Winding-up—Claims for indemnity—Covenant to indemnify—Costs of winding-up.

The deed of settlement of the E. Life Assurance Company provided that in every policy and in every contract to be entered into on behalf of the company there should be "a proviso limiting the scope and effect of the contract thereby created, so that the capital, stock, and funds of the company should alone be liable to answer and make good all claims in respect of any policy of assurance, or policy of guarantee, or other contract, as the case might be, and that no shareholder of the company should in any manner be personally liable or subject to any such claims or demands, or be in any wise charged by reason of such policy beyond the amount of his or her share or shares of such capital, stock, or funds." Another clause of the deed provided that the directors might, upon such terms, for such considerations, and in such manner generally as to the directors should seem expedient, purchase the business and property of any other assurance company, and thereupon undertake, pay, or perform all or any of the existing assurances, or other engagements or liabilities whatsoever, of such other company, and enter into such indemnities, &c., as should be requisite or deemed expedient for the purpose of effectuating the purchase. Another clause gave special powers to the directors for the increase of the business, with a proviso that these powers were not to be exercised so as to alter the provisions of the deed with respect to the liability to losses, so as to render the shareholders liable to such losses, otherwise than in proportion to the amount and number of the respective shares held or subscribed for by them in the stock of the company.

This company bought the business of the B. Assurance Association, and by the deed of transfer it

covenanted to pay all the existing debts and liabilities of the B. Association, and further to indemnify the Association "against all actions, suits, proceedings, costs, damages, claims, and demands whatsoever for, upon account, or in respect of the same, or otherwise in relation thereto," with a proviso that the subscribed capital of the E. Company should alone be liable to answer any claims made in respect of this deed.

Subsequently the E. Company was ordered to be wound-up, and thereupon the B. Association obtained an order for a voluntary winding-up under the supervision of the court.

The B. Association claimed to be entitled, under the covenant, to an indemnity, without limitation of liability, against all claims and demands on them.

Held, that the indemnity was limited to the capital stock or funds of the E. Company.

The B. association further claimed to be entitled, under the covenant, to be indemnified against the costs of its winding-up. In a case in the Albert Arbitration (Re Indemnity Claims, *Reilly's Reports, p.* 17) *a corresponding claim had been disallowed. The arbitrator concurred in an opinion expressed in that case, that the winding-up of the B. Association would settle many things with which the E. Company would have nothing to do. But at present he felt inclined to differ from that decision on one ground, inasmuch as a part of the costs of winding-up the B. Association would necessarily be attributable to a breach of the covenant on the part of the E. Company. However, it could not yet be ascertained what this part of the costs would amount to. Leave was accordingly given for a future application for the purpose of proving for such part of the costs when ascertained.*

THIS was a question as to whether the European Society was, under a deed of amalgamation, bound to indemnify another company against all claims without any limitation of liability; and, further, whether the indemnity was to include the costs of winding-up the second company.

The deed of settlement of the European Society, dated the 2nd Sept. 1854, contained the following provisions:

Clause 24 provides that the directors may grant policies, &c.; provided always,

That there shall be contained therein, and in every other contract to be entered into on behalf of the company in or about the premises, a reference to these presents, and a proviso limiting the scope and effect of the contract thereby created, so that the capital stock and funds of the company shall alone be liable to answer and make good all claims in respect of any policy of assurance, or policy of guarantee, or other contract, as the case may be, and that no shareholder of the company shall in any manner be personally liable or subject to any such claims or demands, or be in anywise charged by reason of such policy beyond the amount of his or her share or shares of such capital stock or funds.

Clause 104:—

That it shall be lawful for the board of directors specially called for the purpose to contract for and complete the purchase or acquisition, upon such terms, for such consideration, and in such manner generally as to the said board shall seem expedient, of the goodwill or business, and all or any part of the stock, assets, or property of any other company or companies, society or societies, established or created by special Act or Acts of Parliament, or otherwise howsoever, for any purposes or objects, the same as or resembling all or any of the objects or purposes of the company herein set forth, and thereupon to undertake, pay, or perform all or any of the existing assurances, annuities, endowments, guarantees, or other engagements or liabilities whatsoever of such other company or companies, society or societies, and to enter into, make, and execute all such agreements, arrangements, and indemnities, acts, deeds, matters, and things whatsoever as shall be requisite or necessary, or be deemed expedient for the purpose of effectuating any and every such purchase or other acquisition as aforesaid, and for such purposes or any of them to dispose of or assign, or change the pecuniary funds or capital for the time being of the company, and all or any of such shares in the present or future capital thereof, as by reason of forfeiture, non-allotment, or otherwise shall for the time being be vested in or under the control or at the disposition of the board, and to deal with such last-mentioned shares, or any of them respectively, either by altering the amount, value, or denomination thereof, or by sub-dividing or amalgamating the same or any of them respectively, or by granting peculiar or exclusive rights or privileges or benefits to the holders for the time being thereof respectively, or in any other manner which to the said board of directors, if and when they shall from time to time be duly authorised as aforesaid, shall appear expedient.

Clause 105:

That an extraordinary general meeting called for the purpose shall (provided two-thirds of the votes at such meeting, to be ascertained by show of hands or by ballot as hereinbefore is provided, shall be in favour of the same) have power to increase the business of the company by authorising the board of directors to undertake and carry on any other business of a similar or kindred nature to those hereinbefore mentioned, which the said board may lawfully undertake and carry on, and also full power to make any laws, regulations, and provisions for carrying into effect such increase of business, and generally to make any new laws, regulations, or provisions for or respecting the company, or to amend, alter, or repeal either wholly or in part, all or any of the laws, regulations, and provisions for the time being of the company, whether contained and expressed in this deed of settlement, or made in pursuance of the powers herein contained, subject, nevertheless, in all cases to the provisions and restrictions of the said Act (7 & 8 Vict. c. 110), and to the proviso hereinafter contained: Provided always that the powers hereinbefore given shall not be exercised so as to affect or alter the provisions of these presents respecting the rateable division of the profits and liability to the losses of the company as between the shareholders, so as to render the shareholders entitled to such profits or liable to such losses otherwise than in proportion to the amount and number of their respective shares held or subscribed for by them in the capital stock of the company, or so as to affect or alter the provisions hereof for the indemnity of the officers or as to the dissolution of the company.

In 1865 negotiations were entered into for the transfer of the business of the British Nation Life Assurance Association to the European Society. The terms proposed for the transfer were these:

1. That the British Nation and the European combine and constitute one united and amalgamated company.

2. That all present appointments of agents and others remain undisturbed, it being one of the chief considerations of the union that the present goodwill and valuable business connections, producing as they do a new business, yielding an annual income of more than 55,000*l.* a year, and a gross income of exceeding 300,000*l.* a year should be preserved to the united company.

3. That, the European having obtained an Act of Parliament securing certain special advantages, the united company be worked under the European deed and Act of Parliament.

4. That the shareholders of the British Nation, on signing the European deed, be allowed three shares of 2*l.* 10*s.* each, with 10*s.* 6*d.* per share paid thereon, for each one share held by them in the British Nation Association. The shareholders of the British Nation, numbering say 300, when thus added to the shareholders of the European, numbering say 800, will represent a proprietary of upwards of 1100 shareholders, and a subscribed capital of more than 600,000*l.* sterling.

5. That seven directors of the British Nation Association join the board of the European.

At meetings of the board of directors and of the shareholders of the British Nation, and at meetings of the European board of directors, resolutions were passed approving and accepting these terms.

The arrangement was carried into effect by the deed of amalgamation, which was dated the 16th March 1865. By this deed the business and property of the British Nation Association were transferred to the European Society, and it was further witnessed that:—

In consideration of the union, amalgamation, or consolidation aforesaid, and of the premises, the European Society doth hereby for itself, its successors and assigns, covenant with the Association that the society, its successors or assigns, will from and after the execution of these presents undertake, pay, or perform all and every of the existing bond and other debts assurances, annuities, endowments, guarantees, and other engagements or liabilities of the association, and will at all times hereafter save, defend, keep harmless, and indemnified the association, and the individual proprietors of shares in the capital thereof, from and against all actions, suits, proceedings, costs, damages, claims, and demands whatsoever, for, upon account, or in respect of the same, all, any, or either of them, or otherwise in relation thereto respectively.

And there was a proviso that:—

The true intent and meaning of these presents is that the subscribed capital of the society remaining at the time of any claim made in respect of these presents, or by any holders of any policies, or by any annuitant or otherwise by virtue of any of the covenants, clauses, and agreements herein contained, shall alone be liable to answer such claims, and that no director or other proprietor of the society, his heirs and executors or administrators, shall by reason of any of the covenants, clauses, and agreements hereinbefore contained, be in any wise individually liable to pay any such claim or claims against the society beyond the amount of the unpaid part (if any) of his particular share or shares of the subscribed capital of the society.

On the 12th Jan. 1872, an order was made for winding-up the European Society; and subsequently an order for the voluntary winding-up of the British Nation Association subject to the supervision of the court.

The questions now for consideration were, first, Whether the liability of the European Society to indemnify the British Nation Association was limited to the subscribed capital of the society or wholly unlimited. Secondly, whether the European Society was liable to indemnify the British Nation Association against the costs of and incidental to the winding-up of the Association.

Millar, for the British Nation Association, contended that the liability was unlimited.

Lord Westbury.—Look at clause 24 of the deed. That clause says that in every contract to be made by the company there shall be inserted a limitation clause. You see they could not get limited liability by the existing law at that time, and therefore they substituted for it this arrangement and contract *inter se*. They provided that the liability of the shareholders of the European Society should never be carried to any extent beyond the extent of that stipulation. If that be so, would it not resolve itself very easily into this conclusion, that, if the deed of amalgamation be in conformity with that stipulation, then undoubtedly there is no unlimited liability; but if the deed of amalgamation be in any respect inconsistent with the deed of settlement, then, so far as it is inconsistent, it was *ultra vires* of the contracting parties.

Millar urged that there was nothing in the proposal to amalgamate, nor in the resolutions of the companies, which showed that the liability was to be limited. With regard to the second question, the terms of the covenant to indemnify were extremely wide. The costs incurred by the British Nation in its winding-up would be incurred in consequence of the European not abiding by its covenant to pay the debts of the British Nation.

Lord Westbury.—Some of the costs for which you contend are costs which result, not from the refusal or inability of the European Society to pay, but from your own inability to pay. How can I throw upon the European Society the costs that have been the consequence of your inability?

Millar.—The winding-up of the British Nation is the direct consequence of the failure of the European to pay; it is not for the European to say that they are not liable to pay the costs, because it might be necessary to collect money from the British Nation shareholders under a possible existing liability.

Lord Westbury.—Let us look at it again in this way. I feel the equity and justice of what you contend for—all you say may be very reasonable; but I cannot go beyond the limit of the words. Now, what does the word "costs" mean? The costs of the British Nation being compelled to do what the European engaged to do. Now, the costs of the British Nation doing what the other society failed to do would be the costs of payment to the creditors of the British Nation; but you have not paid them. Let me suggest another view of the case to you, which does not, I think, appear to have been presented to Lord Cairns according to this report (Reilly's Reports, p. 17, *Indemnity Claims*), and I beg your attention to it. You have been attracted by that word costs, and have built your argument upon it. Suppose we put that aside for one moment, and look at this. The covenant is to indemnify "against all actions, suits, proceedings, costs, damages, claims, and demands whatsoever, for, upon account, or in respect of the same." The "same" is the contracts or liabilities of the British Nation. Now, then, suppose you call the liquidation to which you have been subjected a *proceeding* against you, and suppose you call, therefore, upon the European to indemnify you against the costs of that proceeding; how would it stand then? Does the European Society dispute that the proceedings to wind-up the British Nation have been occasioned by the inability or refusal of the European to pay these debts?

Napier Higgins.—I rely upon the fact that the winding-up of the British Nation is a voluntary act on behalf of that body, and also that their winding-up will effect many things with which the European have nothing whatever to do.

Millar.—It was with a view of anticipating the catastrophe that has occurred, and in consequence of the failure of the European to meet the engagements it entered into with us, that the British Nation, so to speak, called themselves together, and passed a resolution to wind-up.

Lord Westbury.—Take the word "proceeding" in connection with its companions, "actions and suits," does it not mean an adverse proceeding by an individual against you? You met together as a mode of precaution, in order to determine the amount of your own contributions. You instituted this voluntary proceeding; can this be brought within the meaning of the word "proceeding."

Millar contended that it could.

Lord WESTBURY.—Have you paid anybody?

Millar.—I presume not yet; the European have our assets, with which the debts ought to have been paid.

Lord WESTBURY.—How are you to bring any action at law without having paid anybody? I should be quite with you if you had paid. You come here at the present time telling me there is a proceeding under which your liability may be very considerable, but at present that liability has not been matured and enforced against you. You have paid nothing, and the only damage that you have at present sustained is the self-inflicted damage of this proceeding to wind-up.

Millar contended that it was not self-inflicted; it was merely anticipating something worse. What was now asked for was something in the nature of a declaration as to the effect of this covenant of indemnity.

Lord WESTBURY.—What would be the good of that declaration? A general declaration of an unascertained liability could not be made by me, because any declaration I now make would be directed to assist you, or enable you to prove against the assets of the European Company. How can I make a declaration that would cover all the expenses of your winding-up, and throw them upon the European, when it has been found, or may be found, that the winding-up has been made applicable to other purposes than the purposes of paying the debts of the European? Moreover, you cannot tell me what any of your costs are, neither can you tell me what they will hereafter be found to be, neither can you tell me what proportion will be attributable to each of the claims; therefore the order which I at present propose to make, and which I state now only that you may argue it, is an order of this kind:—"Having regard to the fact that the engagements, against which the European covenant to indemnify the British Nation, have not been paid or satisfied by the British Nation, and having regard also to the fact that the costs of the proceedings to wind-up the British Nation have not yet been ascertained, I refuse to make any order at present; but without prejudice to any future application on the part of the British Nation, after the winding-up is complete, for the purpose of proving against the European such part of the costs incurred in that winding-up as can be proved to have resulted from the non-payment of those engagements by the European." I cannot make a general declaration now, which will terminate in nothing, which will define nothing, and give you no right; but I can reserve to you the right of making your claim when the amount of damage recoverable under this covenant has been ascertained.

Millar objected to the words "after the winding-up" in the proposed order.

Lord WESTBURY.—I reserve to you liberty to come whenever you are able to show what part of the expenses of your winding-up has been occasioned by the refusal or the inability of the European to pay.

Napier Higgins.—I suppose it will not be taken that the European liquidator has consented to the view that any costs can come upon the European. The whole question will be open. We shall rely upon the decision of Lord Cairns in many similar cases in the Albert arbitration.

Lord WESTBURY.—I entirely concur with Lord Cairns in this part of the judgment, that the winding-up will settle a great many things with which the European have nothing to do. I do not at all give any decision at present. It is subject to your argument, Mr. Higgins, if I should ever hear it, namely, that no claim can be made for costs. If Mr. Millar were able to come to me now, and say, "Our winding-up is complete, we have paid or satisfied, upon the principle that proof is payment, all these contracts that you ought to have settled; the expenses of doing so have been so much"; I could not possibly refuse it. Also, if he should show me that the amount, or a proportionate part of the general amount of these expenses had been occasioned by the European refusing to act, I could not possibly refuse it.

Napier Higgins, Q.C. and *Montague Cookson* appeared for the official liquidators of the European Society.

Lord WESTBURY.—With regard to the first question, I think there is no reasonable ground for making any such claim. It is quite clear that the powers of the directors of the European Society would be limited by the restrictions imposed upon them by the deed of settlement, and which restrictions are followed in the deed of amalgamation. The deed of settlement never contemplated that the shareholders could, by force of any contract made by the directors, be subjected to a liability beyond the amount of the liability in respect of their shares. There may possibly be an exception of contracts made by the directors for the purposes of the company; with those I do not deal, but I am dealing here with the contract for purchase, or for the amalgamation or union with the European, of a very large and similar undertaking, namely the British Nation; and any contract for that purpose under the 24th clause of the deed must be a contract that shall not avail to throw upon the shareholders, even in name, any liability beyond the liability to which they were then subject in respect of their shares. It is quite clear that this was purfectly well known to the British Nation at the time of the engagement, and accordingly it was the basis of their mutual agreement. The deed of amalgamation faithfully represents that course, and in that deed of amalgamation there is the express stipulation appended to the covenant by the society, restricting any larger application of that covenant, and limiting the effect to that open by the deed of settlement, namely, that it should throw upon the shareholders of the European a liability only to the extent of their unpaid capital. There was therefore no pretence for saying there was unlimited liability upon the part of the European shareholders; and if it had not been for the engagement under which you all mutually came—which I desire always to promote, because the European will gain, by promoting arrangements of that kind, much greater benefit in the dispatch of business and in avoiding a lapse of time than it will suffer loss from paying the costs—if it had not been for that arrangement and my desire to promote it, I should have made the British Natiou pay the costs of the case. But, having regard to the manner in which it has come here, I give the British Nation their costs of the case out of the estate of the European. With regard to the costs incurred by the British Nation in its liquidation, there is a much more difficult question. In point of reason

and in point of justice, I think that I ought to give some effect to the covenant of indemnity so far as that covenant extends to the costs that may be sustained by the British Nation in consequence of the refusal or the inability of the European to fulfil its engagements; but, as I have already explained, it would be idle for me to make a general declaration upon the subject of the costs, when that declaration could not conclude in any distinct direction the amount of damage sustained by the breach of the engagement by the European. Here I find a claim made for the general costs of the whole of the proceeding, which proceeding is directed to a number of objects beyond and exclusive of the object of coming to be indemnified for the costs incurred by reason of these particular debts not having been paid. I cannot, therefore, deal with that question in a final manner; for a general declaration, without pointing to the sum to be proved, would be a barren one. I cannot deal with that till the whole amount of costs incurred in that proceeding by the British Nation has been ascertained, and until the British Nation can come here with a definite statement that the whole of those costs, or some definite part of them, has been incurred by reason of a breach of this covenant on the part of the European; that portion of the case must stand over, with liberty to the British Nation to apply.

Solicitors: *Eyre* and *Co.*, for the British Nation Association; *Mercer* and *Mercer*, for the Official Liquidators of the European Society.

Wednesday, Oct. 23.

POWNALL'S CASE.

Life Assurance Company—Amalgamation of companies—Winding-up—Contributory—Liability of shareholders in old company after amalgamation with another company.

The deed of settlement of the B. Life Assurance Association contained a provision giving the directors power to transfer the business and assets of the Association, under certain circumstances, to some other assurance company. In 1865 the business and assets were accordingly transferred to the E. Assurance Company, and, in accordance with the provisions for the amalgamation, three shares in the E. Company were allotted to P., a shareholder of the B. Association, in respect of each of his shares, and the certificates for the B. Association's shares were given up to the E. Company, but P.'s name remained on the B. Association's share register, which had been handed over to the E. Company, together with the other property of the B. Association. In the winding-up of the two companies P. was placed on the lists of contributories to both.

On an application to have his name removed from the B. Association's list, it was

Held that his name must remain on the list.

Notwithstanding the provision in the B. Association's deed giving the the directors power to amalgamate, it must, in order to bind a creditor by the amalgamation arrangement, be shown that the creditor knew of the proposed discharge of P. and others from the character of B. Association shareholders, and that he consented to such discharge.

Moreover, the argument that P. had ceased to be a holder of B. Association's shares on the ground that the amalgamation had in reality effected a transfer to the E. Company, was not tenable.

THIS was a question as to whether the names of the applicants should remain on the list of contributories to the British Nation Assurance Association.

The deed of settlement of the Association, dated the 28th Feb. 1855, contained the following provisions:

Clause 30:

That the votes of three-fourths of the qualified associates present, and not declining to vote at two successive extraordinary general meetings or at the ballot or ballots which, for the purpose of ascertaining the sense of the qualified associates at large, may be taken in consequence of being demanded at such meetings or either of them, shall be requisite to authorize the amalgamation of the association with any other company or society or the dissolution of the association.

Clause 222:

That an amalgamation of the association with any other association or society, if the same can be legally effected, shall only take place upon the recommendation of the board, and with the approval of two extraordinary general meetings, and in the event of the circumstances and prospects of the association being such as, in the unanimous opinion of the actuary for the time being of the association and three other actuaries to be chosen, as hereinafter mentioned, would preclude the probability of the success of the association if left to its own resources.

Clause 223:

That if after one-fourth of the said capital of 300,000*l.* shall have been called up and paid, it shall appear to an extraordinary board that the circumstances and prospects of the association are such as to preclude the probability of the success of the association if left to its own resources, and that it is in the power of the association to amalgamate upon favourable terms with some other association in the same line of business, it shall be lawful for the board to come to a resolution recommending such amalgamation with some such other association to be named in such resolution, and upon certain terms to be therein specified, and thereupon the said board shall call an extraordinary general meeting for the purpose of taking into consideration such recommendation, and if such extraordinary general meeting shall come to a resolution that such recommendation ought to be adopted, the same shall thereupon be referred to the actuary for the time being of the association, and three other actuaries to be chosen by the said general meeting. And the said four actuaries shall be requested to advise: first, whether in their opinion the circumstances and prospects of the association are such as to preclude the reasonable probability of the success of the association if left to its own resources. And if so, then, secondly, whether the proposed amalgamation of the association with the association named for that purpose in the resolution of the board, and upon the terms therein specified, is likely to be advantageous to the associates. And in case the said four actuaries shall differ in their opinion upon the said questions, or shall not send in a reply thereto in writing to the offices of the association within six calendar months from the date of such general meeting, then the recommendation of the board shall be considered as *ipso facto* rejected by the association; but if the said four actuaries shall within six calendar months from the date of such general meeting state in writing, and deliver at the office of the association their opinion in favour of the affirmative of the questions so to be submitted to them as aforesaid, then and in such case the board shall call a second extraordinary general meeting for the purpose of confirming or rejecting the resolution of the previous general meeting in favour of the proposed amalgamation, and such second general meeting shall be held within forty days next after the said actuaries shall have delivered their opinion at the offices of the association, and if such resolution for amalgamation shall be confirmed by such second general meeting, then the same shall, according to the terms proposed, be carried into effect by the board.

The deed of settlement of the European Society

in its 104th clause gave the directors power to purchase the business, &c., of other assurance companies: (*Vide Re British Nation Indemnity, sup.*, p. 4.)

In 1865 the business and assets of the British Nation Association were transferred to the European Society. The deed of amalgamation provided, Clause 3:

That the directors of the European Society shall, immediately after the execution of these presents, allot to each shareholder in the association three shares in the capital of the European Assurance Society in respect of each of his or her shares in the capital of the British Nation Association, and every share so allotted shall be deemed to have the sum of 10*s.* 6*d.* paid up thereon, and the holder thereof shall be entitled to participate in the next and subsequent dividends on shares in the European Assurance Society *pari passu* with the holders of the other shares therein.

In accordance with this provision the directors of the European Society allotted European shares to the shareholders of the British Nation Association, and amongst them to the applicants, Mr. Pownall, Mr. Eyre, and Mr. Sworder, three European shares being allotted in respect of every one British Nation share. The certificates of the British Nation shares were given up to the European Society, but the names of the applicants were not removed from the British Nation share register, which at the time of the amalgamation was handed over, together with the other property, to the European Society. Dividends had been received by, and calls were now being made on, the applicants in respect of the European shares so allotted. In the winding-up of the British Nation Association the names of the applicants were included in the list of contributories, and an application was now made for their removal.

Millar appeared for the applicants.

Montague Cookson for the official liquidator of the British Nation Association was not called on.

Lord WESTBURY.—

There is no ground for this application; the application is made to me by three gentlemen who appear at present to be shareholders, and have been put upon the list, according to the case, as contributories to the British Nation, which is being wound-up. The British Nation is liable to a variety of contracts and engagements. The British Nation in the year 1865 united itself with the European Society; that union, or amalgamation as it is commonly called, was in conformity with the powers contained in the deed of settlement of the European. I will take it that it was also perfectly within the competency of the directors and the shareholders of the British Nation. It was a term in that amalgamation that in lieu of the shares then held by the shareholders of the British Nation, other shares should be given to those shareholders in the European. It is contended, and it may be the fact, that according to the contract between the parties, the character of shareholder in the British Nation was to cease, and the character of shareholder in the European was to supervene, and be substituted for the original status of the shareholder as a member of the British Nation. I do not enter into the question whether it is the strict interpretation of the deed or not; it is the interpretation that has been contended for, and for the purpose of this case I am willing to accept that interpretation. The question is whether this arrangement between the British Nation and the European has any effect whatever upon the persons, who at that time held the shares of the British Nation, liable to its contracts and engagements. Now it is ingeniously suggested that the creditors may be considered as bound because the creditors had notice of the deed of settlement of the British Nation Association, and were aware that it contained a power, under which power that which was actually done—that is, the arrangement actually made between the British Nation and the European—might legally be done; but it is impossible for me to impute to a creditor knowledge of the details of an arrangement which might possibly come within a power contained in the deed of settlement. The creditor has no business with, nor has he any means of prosecuting, any inquiry as to what is done under that power. To bind the creditor you must prove that the creditor knew of this proposed substitution, or rather of this supposed discharge of the persons from the character of shareholders of the British Nation, and that he consented to those shareholders being so discharged. There is no pretext for any such thing; there is nothing from which you can impute to any creditor existing at the time acquiescence in his debtor being released from his engagements, and the debtor being converted into another person who would not be liable for that engagement. The whole thing fails utterly. If this has been brought here by arrangement between the parties, I will give Mr. Pownall his costs out of the estate; but if it has not been the subject of arrangement there is so little pretext for it that I should not allow him to receive his costs. I must advert to one other argument, which is this. It is contended that, under the agreement, in reality there has been a *bonâ fide* transfer of the shares of Mr Pownall in the British Nation to the European itself, and that therefore he has ceased to be the holder of shares. The amalgamation deed is not at all a transfer made or effected in the manner in which it would be competent to a shareholder in the British Nation to transfer his shares to another individual, nor was the European ever entered in the Share List of the British Nation as the holder of those shares; it could not by any possibility be so, because the whole thing was transferred bodily from the British Nation to the European. The man has parted with his shares, but he has retained his liability, and therefore he must still remain in the character in which he originally was, namely, as a shareholder of the British Nation, until all the contracts and engagements to which he became a party in that company have been discharged. How has this case been brought forward?

Montague Cookson.—I believe that a large number of cases are in the same position as Mr. Pownall's, and your Lordship's ruling will apply to them.

Lord WESTBURY.—If that be so, you must have your costs.

Montague Cookson.—The costs of course will come out of the British Nation funds, it being an application in the British Nation, having nothing to do with the European.

Lord WESTBURY.—Yes, the costs out of the assets of the British Nation.

Solicitors: *Eyre* and *Co.* for the applicant; *Mercer* and *Mercer* for the Official Liquidator of the British Nation Association.

Wednesday, Oct. 23.

Re INDIA AND LONDON LIFE ASSURANCE COMPANY; *Ex parte* DYKE.

List of contributories ordered to be settled at once—Refusal of application to have a separate liquidator appointed for this company—No absorbed company has a right to appear separately.

THIS was an application for the appointment of a separate liquidator of the India and London Life Assurance Company.

This company became amalgamated with the European Assurance Society in 1860. There were now only three creditors of the company, in respect of annuity policies. The applicant, Colonel Dyke, was one of these, and had obtained an order to wind-up the India and London Company.

Gardner, for the applicant, contended that it was not just that the payment of these three creditors should be delayed by the proceedings in winding-up the European and the other companies. A separate liquidator should be appointed for the India and London Company, and the winding-up completed speedily.

Lord WESTBURY.—Is it necessary to have a separate liquidator? Why should I not direct that the list of contributories in the India and London Company should be forthwith settled?

Gardner.—If your Lordship will do that, and give us liberty to attend the proceedings, we shall be satisfied.

Lord WESTBURY.—You can attend the proceedings immediately upon giving proof of your debt.

Napier Higgins, Q.C., and *Montague Cookson* appeared for the official liquidator of the India and London Company.

Lord WESTBURY.—

Let the joint official liquidator proceed at once to settle the list of contributories in the India and London Company. Let the applicant be at liberty to bring in such proof as he thinks he can establish in the ordinary way. All I can do by this order is to accelerate and have done immediately that which there is no reason for delaying, and that which, being done at once, will facilitate the objects of justice by removing this little company, on the payment of its few debts, from before me. I cannot give you any costs of this matter, Mr. Gardner, because there has been no refusal. You come here for your own benefit to get the matter accelerated, in order that you may be paid. It is very right and very fit to come here, but at the same time, there has been no delay and no default, and therefore I cannot take the money out of the pockets of the European Society to pay you for your individual convenience. You will bear your own costs: you will have them from your own company.

Gardner.—I suppose we may add our costs to our proof against the India and London Company?

Lord WESTBURY.—Yes.

Upton appeared for the firm who had been the solicitors to the India and London Company before the commencement of the winding-up, and contended that the costs ought not to be borne by that company, the application being wholly unnecessary.

Lord WESTBURY.—I do not think it is at all an unnecessary application. If you could have proved to me that you had said to these gentlemen, "We will have the list of contributories settled immediately, and we will make a call and raise money to pay you," then I should have said the applicant was in too much hurry in coming here; but you have done nothing of the kind. The order will stand as I have pronounced it: but I still incline to the opinion that Mr. Higgins must have his costs out of the estate of the European. It must not be considered from what I have done to-day that I recognise the right of any one of these absorbed companies to come here and claim a *locus standi* in any independent capacity. If Mr. Higgins had told me that he represented the India and London Company, I should have abstained from recognising the gentleman who appeared. I mention this so that it may not be brought into a precedent.

Napier Higgins.—The gentleman who appeared was from the office of Messrs. Upton, who were the solicitors before the liquidation began. I now appear for the joint official liquidator of the India and London Company; that was the reason why I thought that your Lordship might give us the costs out of the estate of that company, as the European do not oppose.

Lord WESTBURY.—I shall not make them pay your costs. I do not think anything has been said against that company with regard to any other costs. I mention it only that it may not be supposed I shall recognise the right of any absorbed company to appear separately.

Solicitors for the applicant, *Dangerfield* and *Frazer.*

Solicitors for the official liquidator of the India and London Company, *Mercer* and *Mercer.*

Friday, Oct. 25.

READ'S CASE.

Company—Winding-up—Contributory — Informal transfer of shares—Transfer of shares to man of straw—Alleged neglect by directors—Unpaid calls.

The deed of settlement of the E. Company contained a provision whereby a shareholder might submit for the directors' approval the name of a proposed transferee of his shares, and if the proposed transferee should be approved of, or if the directors should not within fourteen days propose some other person to take the shares at the market price (in which case the person so proposed should be considered as approved of by them), then the shareholder might, according to a form to be sanctioned by the directors, transfer his shares to his own proposed transferee, who thereupon might, on executing the deed of settlement, or a covenant to abide by the provisions of the deed, be entitled to call upon the directors to place his name on the register of shareholders as the proprietor of such shares; with a proviso that no shares should be transferred until all instalments or calls actually due and payable in respect thereof had been paid. And there was a further provision that no share should be transferred to any person who had not been first approved of or considered as approved of by the directors, and that if any transfer should be made or attempted to be made to any person, who had not been so first approved of, such transfer should be void.

On the 28th April 1871, *after the presentation of an unsuccessful petition to wind-up the company, and shortly before the presentation of a successful petition, R., who held* 400 *shares in the company,*

executed a transfer of them to his employé A., in consideration of the sum of 5s. *The same day R.'s solicitor sent the transfer to the company for registration. On the* 29*th April the secretary of the company returned the transfer, and informed the solicitor that all such transfers must be on the special form provided by the company, and which was only issued after an application had been sent in and approved of by the directors. Thereupon, the solicitor, on the* 2*nd May, gave notice in writing of R.'s wish to transfer his shares to A., and requested that the form of transfer might be forwarded. However, the notice did not state the calling of the proposed transferee, as the deed of settlement required. A day or two after the solicitor's clerk had an interview with the secretary, and was told by him that the directors proposed taking into consideration many recent applications for transfers. The secretary, on being informed that an informal notice had been sent, dispensed with the special form of notice usually required by the directors, and desired that the solicitor should again communicate with him in writing, requesting a reply to his letter of the* 2*nd May. This was done by a letter from the solicitor, dated the* 8*th May. On the* 20*th May a call of* 5s. *per share became due and payable, and on the* 10*th June the successful petition to wind-up the company was presented. On the* 14*th June the solicitor again wrote, asking for a special form of transfer, and stating that R. would pay the call when the transfer was forwarded for registration. Pending the proceedings on the petition to wind-up the company the directors refused to take any action with reference to the transfer of the shares. On the* 28*th June R. sent the original informal transfer to the company, together with a cheque for* 100*l., the amount of the call due on the shares. In the winding-up R.'s name was still on the share register, and he was placed on the list of contributories. He applied to have his name removed from the list, on the ground that on the expiration of a fortnight from the giving of notice he was entitled to transfer his shares, either to his proposed transferee or to a transferee proposed by the directors, and that thus the transfer would have been effectually completed before the presentation of the petition to wind-up, but for the neglect of the directors in not sending the special form of transfer.*

Held, that the name must remain on the list of contributories.

In such a transaction the whole equity of the shareholder depends on his being able to show that he had completed, duly and regularly, a legal transfer of his shares, before the presentation of the successful petition to wind-up. Not being able to do so, R. had no grounds for having his name removed from the list of contributories.

With regard to the alleged neglect of the directors, the letter of the 14*th June of itself showed that there was no ground for imputing to them wilful delay in completing the transfer. And, further, if the form of transfer had been sent by them, it could not have been made available until after the call was paid.*

No weight attached to the decision in Bargate *v.* Shortridge (5 *H. L. Cas.* 297).

THIS was an application for the removal of Mr. Joseph Read's name from the list of contributories to the European Assurance Society.

The Society's deed of settlement contained the following provisions with reference to the transfer of shares.

Clause 96:

That it shall be lawful for any shareholder in the company, and for the husband of any female shareholder, and for the executors, or administrators of any deceased shareholder, and for the assignees of any bankrupt or insolvent shareholder, to procure some person or persons to become a shareholder or shareholders in respect of all or any of the shares for the time being belonging to such shareholder or which belonged to such deceased shareholder, or to such bankrupt or insolvent shareholder, and when, and as any such shareholder, husband, executors, administrators, or assignees shall have procured some person or persons who is or are willing to become a shareholder or shareholders, such shareholder, husband, executors, administrators, or assignees (as the case may be), shall give notice, in writing, at the office of the company, of his or their having done so, and request the board to certify their approbation or disapprobation of such person or persons, and shall describe in such notice the full name and profession or calling, and place of abode of the proposed shareholder, or of each proposed shareholder, if more than one, and the number of shares in respect of which he, she, or they shall be proposed to become a shareholder or shareholders, and if the person or persons shall be approved of as hereinafter mentioned, or if the directors shall not, within fourteen days, propose some other person or persons to take the share or shares proposed to be transferred at the then market price for the time (in which case the person or persons so proposed shall be considered as approved of by them), then and in such case such shareholder, husband, executors, administrators, or assignees (as the case may be) may transfer the same share or shares to such person or persons so proposed and approved, and thereupon each or any such person shall, upon executing, at the office of the company or at such other place as the board of directors shall require, these presents or a deed of covenant to abide by the provisions herein contained, and the rules and regulations of the company, be entitled as regards the share or shares so transferred to him or her, to call upon the board of directors to enter his or her name in the register of shareholders as proprietor thereof, and the board shall accordingly do so, and upon such entry being made, he or she shall become the proprietor or proprietors thereof, provided nevertheless that no share or shares shall be transferred until all instalments or calls actually due and payable in respect thereof shall have been fully paid up.

Clause 97:

That as well every transfer of a share, as every deed of covenant, to be executed as aforesaid, shall be prepared according to a form or forms to be sanctioned and approved of by the board of directors; and no share in the company shall be transferred by any shareholder, or by the husband of any female shareholder, or by the executors or administrators of a deceased shareholder, or by the assignees of any bankrupt or insolvent shareholder, to any person who has not been first approved of, or considered as approved of, as aforesaid, by the board of directors, or a committee of directors, appointed by the said board for the purpose. And if any transfer of any share or shares shall be made, or attempted to be made, to any person who has not been so first approved, any such transfer shall be void; and as well every transfer of a share as every deed of covenant to be executed in the cases as aforesaid, shall be executed at the company's office, or such other place as the board of directors, or the said committee of directors, may require or approve of; and such deed of covenant shall at all times be prepared under the direction of such board or committee, and at the expense of the person entering into the covenants therein contained; and every such transfer and deed of covenant shall be deposited at the office of the company, or other place appointed by the board, and kept by them; but any person for the time being claiming under any such transfer may, by writing under his or her hand, require the same to be produced to him or her; and it shall be lawful for the board of directors to demand and receive from the seller of any share or shares a fee on each transfer preparatory to the approval of the shareholder, not exceeding 1s., such fees to be applied and disposed of in such

manner as the board of directors may from time to time see fit.

In 1869 and 1870 petitions were presented to wind-up the society, but they were unsuccessful.

In 1871 Mr. Read held 400 shares in the society, and on the 28th April 1871, he executed a transfer, whereby he, the said Joseph Read, of 74, Lord-street, Liverpool, in consideration of 5*s.*, transferred his 400 shares to William Atkinson, of 74, Lord-street aforesaid, book-keeper, and William Atkinson agreed to accept the shares.

On the day of execution, the 28th April 1871, Mr. Gill, the solicitor of Mr. Read, forwarded the transfer to the secretary of the society in the following letter:—

Sir,—I beg to forward you transfer of shares, which I shall be glad to hear has been registered, and to receive fresh scrip in place of the three certificates of the People's Provident Assurance Society, which I also inclose.—Yours obediently, J. H. E. Gill.
The Secretary, European Assurance Society.

(The People's Provident Assurance Society, being the old name of the European Assurance Society.) On the 29th April 1871, the secretary of the society, sent the following reply:—

Sir,—I beg to return this transfer, as all such deeds must be on the special form provided by the society, and which is only issued after an application has been sent in and approved by the directors.—Yours faithfully,
J. H. E. Gill, Esq. D. Easum, Secretary.

On the 2nd May 1871, the applicant's solicitor again wrote to the secretary:—

Sir,—Mr. Joseph Read, the holder of shares in the European Assurance Society, in place of 400 shares formerly standing in his name in the books of the People's Provident Assurance Society, wishes to transfer them to Mr. William Atkinson, of 74, Lord-street, Liverpool. May I trouble you, therefore, to forward me the form of transfer used by your society for this purpose.—Yours obediently, J. H. E. Gill.
The Secretary, European Assurance Society.

A day or two after, Mr. Gill's clerk called at the office of the society and was informed by the secretary that the directors proposed to take into consideration many recent applications for transfer of shares. The secretary inquired if any notice of the wish to transfer had been sent to the office, and was told that a notice had been sent. Thereupon the secretary told the clerk that a special form of application was supplied to shareholders, but if notice had been given it was sufficient, and he further desired that Mr. Gill should communicate again with him in writing requesting a reply to Mr. Gill's last letter of the 2nd May. Accordingly Mr. Gill wrote to the secretary on the 8th May 1871, as follows:

Sir,—Referring to my letter to you of the 2nd, I shall be glad to receive forms of transfer for the shares Mr. Joseph Read wishes to assign to Mr. William Atkinson.—Yours faithfully, J. H. E. Gill.
The Secretary, European Assurance Society.

On the 20th May 1871, a call of 5*s.* per share became due and payable. And on the 10th June 1871, the successful petition to wind-up the society was presented. On the 14th June 1871, Mr. Gill wrote to the secretary:

Sir,—Referring to your letter to me of the 29th April, and my reply of the 2nd May last, I shall feel obliged by your at once forwarding me the special form of transfer referred to in your letter, so that I may send you a transfer of the shares held by Mr. Joseph Read, of No. 74, Lord-street, Liverpool, to Mr. Wm. Atkinson, of No. 74, Lord-street, Liverpool, book-keeper. Mr. Read will pay the call which has been made since his application, when the transfer is forwarded for registration.—Yours obediently, J. H. E. Gill.
The Secretary, European Assurance Society.

The secretary replied on 15th June 1871:

Dear Sir,—We do not appear to have received a notice of transfer, so inclose one herewith. At the same time, I had better state it will be quite impossible for the directors to entertain it until all calls now due are paid.—Yours faithfully, D. Easum, Secretary.
J. W. E. Gill, Esq.

On the 17th June 1871, Mr. Gill again wrote to the secretary:

Dear Sir,—I must remind you that at your interview with the writer on the 5th May, you stated that a letter containing information as to the proposed transfer, and which you were told had been sent was sufficient as a notice. I have, however, filled up the form with the date of my original application on behalf of Mr. Read. The application having been made prior to the call, the directors cannot have declined to entertain the application until the calls were paid. The calls, however, will be paid when the transfer is forwarded. I shall be glad to hear from you by return of post that the directors have approved it.—Yours faithfully, J. H. E. Gill.
The Secretary, European Assurance Society.

To this the secretary replied, that pending the proceedings on the petition to wind-up the society, the directors could not take any action on these or any other shares, and that no notice of transfer could be brought before the committee until after all calls were paid. On the 28th June 1871, a clerk to Messrs. Chester and Urquhart, the agents of the applicant's solicitor delivered to Mr. Bristow, an officer of the society, the transfer before alluded to, and a cheque for 100*l.*, together with the following letter:

Dear Sir,—We hand you herewith transfer herein of the shares held by Mr. Read in your society for registration. We also hand you herewith our cheque for 100*l.* for the amount of calls due on these shares. We must beg you to understand that Mr. Read will stand upon his rights, and consider the notice of wish to transfer as of the original date in May last.—Yours truly,
Chester and Urquhart.
The Secretary, European Assurance Society.

The clerk stated in his affidavit that Mr. Bristow handed back the cheque for 100*l.* with directions to pay it into Messrs. Hopkins, and Co.'s bank to the credit of the society, and this was accordingly done.

On the 3rd July 1871, the secretary wrote to Messrs. Chester and Urquhart as follows:—

Gentlemen,—I am in receipt of yours of the 28th. I have fully explained to Mr. Gill the reason no transfer can be passed; consequently I am much surprised at receiving yours. I beg to say that the papers are informal (as I have before told Mr. Gill) and therefore return them.—Yours faithfully, D. Easum, Secretary.

In his affidavit, the clerk stated that no enclosures were sent in this letter, and on attention being drawn to this, no reply was ever received from the society.

The order to wind-up the society was made on the 12th Jan. 1872. The transfer of Mr. Read's 400 shares was never registered, and they accordingly still stood in his name in the share register. His name having been included in the list of contributories, he now applied to have it removed.

Hemming for the applicant.

Lord Westbury.—Does Mr. Atkinson appear? I cannot leave a blank upon the register. If I take Mr. Read's name off, I must put another on.

Hemming.—There are precedents for taking a name off without another name being put on.

Lord Westbury.—Not a precedent arising from a transaction such as yours. You say you trans-

ferred the shares to Mr. Atkinson. I cannot decide the case completely without Mr. Atkinson being here. It makes your case stronger if Mr. Atkinson says, "I am of the same opinion with Mr. Read, that the transaction was complete, and in evidence of that I am willing to be substituted." I think if you will appear for Mr. Atkinson, having authority to do so, we may proceed.

Hemming (after consulting with the applicant's solicitor,) stated that he could proceed, as he was instructed to appear for Mr. Atkinson also. He contended that the first letter of the applicant's solicitor was a valid, though an irregular notice of the wish to transfer; and in any case the notice of the 2nd May 1871, was a good one. After receiving the notice it was incumbent on the directors either to approve of the proposed transferee or to substitute another name within a fortnight. Neither course having been taken by them, the proposed transferee must be considered as approved of, and at the expiration of the fortnight, and therefore long before the presentation of the petition to wind-up, the applicant had a perfect right to transfer his shares to Mr. Atkinson. He was prevented from doing so by the neglect of the directors in not sending the form of transfer, and it is in consequence of this neglect that his name is now on the share register.

Lord WESTBURY.—Then you throw overboard and abandon your transfer. That being so, the case comes before me with no transfer executed, and your sole ground is this, that there has been no transfer because no answer was sent to your letter requesting the form of transfer to be forwarded. You may have a remedy against the directors, but you have no right to say, as against all persons interested, that you have parted with the character of shareholder.

Hemming.—If a shareholder has done all that he can to get rid of his shares, and fails to do so only because the directors have omitted their duty; if he can show that but for their omission of duty he would have been free before the winding-up, he is not too late merely because his name is on the register; he is entitled to have his name removed.

Smith v. *Reese River Company*, L. Rep. 2 Eq. 264; 16 L. T. Rep. N.S. 264;
Re Overend, Gurney and Co.; Ex parte Oakes & Peek, L. Rep. 2 H. L. 325; 15 L. T. Rep. N. S. 652;
Re The Agriculturist Cattle Insurance Company, Bush's Case, L. Rep. 6 Ch. 246; 24 L. T. Rep. N. S. 1.

Lord WESTBURY.—You see, Mr. Hemming, this is the case of a voluntary transfer You have no equity. If you had completed all the legal solemnities, well and good, then you might go; but if you have not completed those legal solemnities, you have not a particle of equity or merit to have anything left undone done for you; and as to delay, your letter of the 14th June, four days after the presentation of the petition to wind-up, precludes you from saying you have any complaint.

Hemming referred to
Re Joint Stock Discount Company; *Fyfe's Case*, L. Rep. 4 Ch. 768;
Bargate v. *Shortridge*, 5 H. L. Cas. 297.

Lord WESTBURY.—I have great reason to remember the last hearing of *Bargate* v. *Shortridge*, by reason of the difference of opinion between Lord Cranworth and Lord St. Leonards, which left the law in a worse state than it was in when the appeal was presented. It was one of the cases in which we struggled to have a re-hearing. The law lords who heard the case were only two, and they were divided in opinion, and we thought that it ought to be reheard. I do not attach any weight to that case, because it was decided on the technical rule of *præsumitur pro negante*.

Hemming further contended that, even if Mr. Atkinson were a man of straw, it would not affect the question; for the deed of settlement provided that, when any transferee was proposed, whether a man of straw or not, the directors were bound either to approve of him or to subsitute another person within a fortnight. The meaning of such a clause is explained by Lord Justice Mellish in

Re Accidental Death Insurance Company; Chappell's Case, L. Rep. 6 Ch. 902; 25 L. T. Rep. N. S. 438.

Montague Cookson appeared for the official liquidators of the European Society, but was not called on.

Lord WESTBURY.—

The claimant in this case is a gentleman holding 400 shares in this society, who, at a time full of doubt and uncertainty with regard to the position of the company, forms the design of transferring his shares for a nominal consideration to his servant, in order that he himself might be relieved from future responsibility. If he had a right to do so, and if he had taken pains completely to do so before his proceedings were intercepted, probably his design would have been effectual; but there is no pretence made to me that this was intended to be, or was in fact, a *bonâ fide* transfer of shares to a gentleman of equal respectability with Mr. Read. Mr. Read comes now to be relieved from his liability on the ground that he really did intend to transfer these shares to his servant, and he complains that he has not been enabled to consummate that attempt by reason of the default of the directors. The argument before me is that everything must be considered to have been done which would have been done if the directors had used perfect diligence, and that if they had used perfect diligence, this transaction would have been completed, and therefore I must take it to be so. This is a case in which no court would feel disposed to abandon or set aside any description of legal difficulty in the way of such an applicant. His whole equity depends on his being able to show that he had completed duly and regularly a legal transfer of his shares before the presentation of the winding-up petition. Now, I am quite willing to take it upon the ground put by his learned counsel, who has argued the case most ably. I am quite willing to put it upon this, that he shall have the credit of having done everything which, if the directors had been diligent, he really could have done. That is all that is contended for, and on that basis I am willing to take it. This society provides a mode by which the shares of its shareholders may be transferred. When a man, who is a shareholder, desires to part with his shares, he has to give notice to the company of his desire so to do, and he is particularly to specify the name of the person to whom he proposes to transfer his shares, and then, as I read the deed, three things may be done. First, the directors may refuse the application; secondly, the directors may propose another person to be substituted as assignee of the shares; or, thirdly, the directors may omit for fourteen days after the notice to assent or dissent, and in that case it shall be considered as against them that they have acceded to the application, and are willing to adopt the pro-

posed transferee of the shares. I quite agree with Mr. Hemming that no special form of notice of the intended transfer is required by the deed, and therefore I cannot insist on the necessity of this gentleman having adopted the notice which the company had prepared. Instead of giving notice of his intention to transfer, the first step taken by him is to make a complete transfer—to execute a deed for that purpose. Now, I must impute to this gentleman, as a shareholder, knowledge of the provisions of the deed of settlement. Accordingly he knew perfectly well that he had no right to make a transfer until he had preceded it by a preliminary notice, not in any special form, but a notice that should be sufficient to give to the directors information of the position and status of the individual to whom the shares were proposed to be transferred. He does not do so; he makes a deed of transfer in his own form to Atkinson, his servant. Atkinson signs the deed, and then the deed is not forwarded to the company by Atkinson, who, if there be *bona fides* in the matter, is the person interested; but it is forwarded to the company by Mr. Gill, the solicitor of Mr. Read, by a letter of the 28th April 1871. That is answered by the secretary on the 29th April—there was not much delay there—in which he says that the special form of transfer provided by the society is only issued after an application has been sent in and approved of by the directors. The application there referred to is plainly the notice of the intended transfer, with the name of the transferee. Now that, I suppose, was received in due course by Mr. Gill—perhaps on the 30th of April—and then comes the letter of the 2nd of May, which Mr. Gill writes to the secretary, in which the position in life, the occupation in life, of Mr. Atkinson is not stated. With that letter the proceedings must be taken to begin, because there Mr. Gill, on the part of Mr. Read, does send a notice for leave to transfer and a notice of the intended transferee, and he applies for the proper form of transfer. That was probably received by the secretary upon the 3rd of May, and is followed by the interview between the clerk of Mr. Gill and the secretary, which we will suppose to have taken place on the 4th of May. In the conversation which then took place, the secretary dispenses with the necessity of using any special form of notice, and taking the letter of Mr. Gill on the 2nd of May to have been a sufficient form of notice, the fourteen days would have to be calculated from the 3rd of May, the date of the receipt of that letter. But the secretary informs Mr. Dumville, the clerk, that the directors intended to hold a meeting for the purpose of considering the applications made to them, and their interview concludes by his desiring him to communicate with him again in writing on his return to Liverpool, requesting a reply to Mr. Gill's last letter of the 2nd May. Mr. Gill accordingly acquiesces in that by a letter of the 8th May, which appears to be a repetition of what was contained in the letter of the 2nd, with the addition of a request for the form of transfer. Now, before the fourteen days had expired, computing them from the date of this letter, upon the 20th May a call of 5*s.* became due and payable, and the necessity of paying that call before any transfer could be made was imposed by the 96th clause of the deed. If, therefore, the form of transfer had then been sent, that transfer could not have been made available until the call of 5*s.* per share, which became due on the 20th May, had been paid. We come now to the letter of the 14th June, and this is a very material letter with reference to the complaint so strenuously insisted upon at the bar, that there had been wilful delay on the part of the directors; the wilful delay must have been delay in sending the form of transfer. I have already said, if the form of transfer had been sent, nothing could have been done with it until the call had been paid; but when a party thus complains of delay, the material inquiry is in what view the matter was regarded by his own solicitor previously to the present complaint. The solicitor, writing upon the 14th June, a long while after the 20th May, and a longer time after the date of his letter of the 8th May, writes to the secretary of the company in the following words:

> Sir,—Referring to your letter to me of the 29th April, and my reply of the 2nd May last, I shall feel obliged by your at once forwarding me the special form of transfer referred to in your letter, so that I may send you a transfer of the shares held by Mr. Joseph Read, of No. 74, Lord-street, Liverpool, to Mr. William Atkinson, of No. 74, Lord-street, Liverpool, bookkeeper. Mr. Read will pay the call which has been made since his application, when the transfer is forwarded for registration.

Now, I must hold that that letter was written by a gentleman who did not consider that he had any ground of imputing wilful delay; who was very willing to go on with the transaction if a form of transfer were then forwarded to him, and did not imagine that he had a right to treat what had previously occurred as dispensing with the necessity of any transfer at all; for that is the argument before me. It is indisputable that the necessity of paying the calls intervened, and that the obligation to pay the same was not for a moment proposed to be fulfilled, until this letter of the 14th was written by the solicitor, four days after the time when all transactions in the company became impossible, and when the request contained in this letter was one that it was no longer in the power of the directors to accede to. I am willing to take the case precisely upon the basis put by Mr. Hemming, and I say that there is not a pretence for imputing to these directors wilful delay in completing the transfer anterior to the 14th June. If there had been such a delay, you would not only not have written the letter of the 14th June, but you would not in that letter have requested a transfer to be sent to you, that you might now proceed upon it, nor would you in that letter of the 14th June have admitted your liability to pay the call, and have promised to pay it when the transfer was completed. There is no justification for any part of the case. I may add, without casting the slightest imputation upon Mr. Read, that when a man is in the unfortunate position of being a shareholder in one of these companies, and more especially when he is in the unfortunate position of being a shareholder in such a company as this, whatever the law allows him to do may be done without reproach, but he takes his chance of completing his legal escape by making it perfect in all particulars, and if he has failed to do that, he cannot escape, and he ought not to attempt to impute to others the cause of his own failure; there is nothing to justify it. I must, therefore, refuse this application. I do not want to enter into any argument, but I should be glad if I could feel my way to treating this case as the means of deciding any other, because then I would not make you pay any penalty for having

brought it here, but if that is not so, I must make you pay the costs.

Hemming.—There must be a multitude of other cases similar to this.

Montague Cookson.—This case is so special with reference to the dates, that I am afraid we cannot say on the part of the liquidators that it is a representative case.

Lord WESTBURY.—I cannot give Mr. Hemming any costs, but will not make him pay any.

Solicitors for the applicant, *Chester, Urquhart, and Co.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Friday, Oct. 25.

LANCEY'S CASE.

Life assurance company—Amalgamation of companies—Winding-up—Contributory—Return of capital—Liability of executor of shareholder in old company after amalgamation with another company.

The deed of settlement of the R. Life Assurance Company contained provisions for dissolution and for transferring its business and part of its assets to another company. There were also provisions whereby on the decease of a shareholder the dividends were not to be payable, and the privileges and rights attending the shares were to remain in suspense, until the executor or some other person became a proprieter of the shares. In 1866 *the company transferred its business and part of its assets to the E. Life Assurance Society, and the E. Society undertook all the liabilities of the R. Society, and covenanted to indemnify the R. Society against all such liabilities, and further agreed to "pay to each shareholder of the R. Society his original paid-up capital upon each share in full," the shareholder to have the option of taking his paid-up capital in shares of the E. Society upon certain terms. L. held* 100 *shares in the R. Society, and in Oct.* 1866, *after the amalgamation, he received a circular informing him of the amalgamation, and giving him the option of receiving back his paid-up capital or of taking instead shares in the E. Society upon certain terms. He took no notice of this circular. On the 7th Dec.* 1866 *L. died, and in Feb.* 1867, *his will was proved by his widow and executrix, Mrs. L. In April* 1867, *it was brought to her notice that she was entitled to exercise her option either of receiving cash in respect of the shares or of taking E. Society shares. Thereupon, as executrix of L., she elected to receive cash, and was paid by the E. Society* 525*l., the amount of the paid-up capital and interest thereon, and she gave up the certificates to the E. Society. Her name was never on the register of the R. Company, but in the winding-up, L.'s name being still on the register, he was at first placed on the list of contributories to the R. Company. Afterwards the list was amended by the substitution of Mrs. L.'s name in place of L.'s name. On her application to have her name removed from the list, it was*

Held that the name must remain.

THIS was an application for the removal of the name of Mrs. Lancey from the list of contributories to the Royal Naval, Military, and East India Company Life Assurance Society.

This society was established in 1839 under a deed of settlement, which contained the following provisions: Clauses 134, 135, 137, and 139, provided for the shares of deceased shareholders. Clauses 140, 141, and 142 provided for the transfer of shares. Clauses 172 and 173 provided for the dissolution of the society and the transfer of its business and assets to some other society.

Clause 134:

That any proprietor of the company may procure some other person to become a proprietor in respect of all or any of the shares holden by him or her in the capital of the company, but that the legatees or next of kin of deceased proprietors shall not be entitled to hold in either of those capacities any share or shares in the capital of the company, and in all cases where legatees or next of kin of deceased proprietors shall become entitled to any share or shares in the capital of the company the executors or administrators of such deceased proprietor shall as between themselves and the company be considered as the holder of such share or shares, and shall be the only person who shall be entitled either to become proprietors or to procure any other person to become proprietor in respect of such share or shares, and the assignees of any bankrupt or insolvent proprietor shall not be proprietors in respect of any share or shares holden by them in the said capital in that capacity, but may in the manner and upon the terms hereinafter, mentioned procure some person to become a proprietor in respect of any share or shares so holden by them.

Clause 135:

That every executor or administrator of a deceased proprietor who shall be desirous of becoming a proprietor in respect of all or any of the shares holden by him or her in either of those capacities, and also any person or persons who shall be desirous of purchasing any share or shares from the court of directors, shall give notice in writing at the office of the company of such his or her desire, and shall describe in such notice his or her name, and place of abode, and the number of shares in respect of which he or she is desirous of becoming a proprietor.

Clause 137:

That every executor or administrator of a deceased proprietor approved of by the court of directors as a fit person to be a proprietor in respect of the share or shares holden by him or her in any of those capacities, shall, within two calendar months after such approval shall have been certified to him or her by the court of directors, execute at the office of the company, or at such other place as the court of directors may require, either in person or by attorney, a deed of covenant by which he or she shall covenant to observe the regulations of the company, and perform all the obligations of a proprietor in respect of such share or shares, and immediately after the execution of such deed, and not before, he or she shall become a proprietor in respect of such share or shares, but nothing contained in this or any other clause shall be construed to increase the number of shares in the capital authorised to be permanently holden by any proprietor beyond 100 shares.

Clause 139:

That all dividends and other profits that may be declared or appropriated on or in respect of any share of any deceased bankrupt or insolvent proprietor, in the interval between his or her death, bankruptcy or petitioning to take the benefit of any Act for the relief of insolvent debtors, and of some person becoming a proprietor of such share shall not be received, neither during such interval shall the rights and privileges attending such share be exercised by any person or persons whomsoever; but the same shall respectively remain in suspense, and as soon as any person shall become a proprietor of such share the executors or administrators of such deceased proprietor or the assignees of such bankrupt or insolvent proprietor shall, on payment of all the instalments which may have been previously called for, and may then remain unpaid on such share, be entitled to receive the dividends and other profits which may have been so suspended as aforesaid.

Clause 140:

That the holder or holders of any share or shares in the capital of the company, whether such holder or holders shall be a proprietor, or the executors, or administrators, or any one or more of the executors or administrators of a deceased proprietor, or the assignees of a bankrupt or insolvent proprietor, who shall have procured some person or persons to become a proprietor or proprietors of all or any of his, her, or their share or shares in the capital of the company, shall give notice in writing at the office of the company of his, her, or their having procured such person or persons to become a proprietor or proprietors, and shall describe in such notice the name and place of abode of such proposed proprietor or proprietors, and the number of the share or of each of the shares in respect of which he, she, or they, shall have procured such person or persons to become a proprietor or proprietors.

Clause 141:

That whenever the court of directors shall have certified that any executor or administrator who may be desirous of becoming a proprietor or any person who may have been procured to become a proprietor of any share or shares in the capital of the company, is fit to be a proprietor of such share or shares, the proprietor or the assignees of the bankrupt or insolvent proprietor or the executors or administrators of the last proprietor, shall be at liberty to transfer the same without delay.

Clause 142:

That every transfer of any share or shares in the capital of the company shall be made either at the office of the company or such other place as the court of directors shall require and in such manner as the said court shall prescribe, for vesting the share or shares in the proposed new proprietor, and every transfer immediately after he or she shall have so transferred any share or shares, and shall have paid the instalment or instalments (if any) then due or called for in respect of the same share or shares and the interest thereon (if any), due, shall in respect of such share or shares cease to be a proprietor of the company or the holder of such share or shares, and shall be for ever thenceforth acquitted and discharged from all obligations and from all the covenants and agreements regulations and stipulations to which by these presents he or she would have been liable in respect of the said share or shares, if he or she had not transferred the same.

Clause 172:

That it shall be lawful for an extraordinary court of directors, specially called for the purpose, to enter into a resolution recommending the dissolution of the company, and upon such dissolution being so recommended, the same extraordinary court of directors shall call an extraordinary general court for the purpose of taking into consideration the propriety of dissolving the company; and if at such extraordinary general court a resolution shall be entered into for dissolving the company, then the court of directors shall call a second extraordinary general court for the purpose of confirming or rejecting such resolution for dissolving, and such second extraordinary general court shall be holden within the space of fifty days after the resolution for dissolving shall have been entered into at the first extraordinary general court, and if such resolution for dissolving shall be confirmed at such second extraordinary general court, then, from the time of such confirmation, the company shall be dissolved, and the business thereof shall be concluded.

Clause 173:

That immediately upon the dissolution of the company the court of directors shall, out of the funds or property of the company, pay and satisfy all immediate claims and demands on the company, arising from assurances, annuities, or other contracts or engagements, and shall (but subject and without prejudice to the provisions hereinafter contained) obtain from the directors or managers of some other assurance company or society, an undertaking to pay and satisfy all or any such as the court of directors may think proper of the remainder of the claims and demands on the company, arising from assurances, annuities, or other contracts or engagements, when and as the times for the payment and satisfaction of the same shall respectively arrive, and shall cause to be transferred to some of the trustees of such other assurance company or society so much of the funds or property of the company as shall be agreed upon between the contracting parties as sufficient, with the premiums that may become payable in respect of all or any of the existing policies, to enable the company or society, from whose directors or managers the undertaking shall have been obtained to comply therewith, and shall make such arrangements with the said directors or managers in regard to the said undertaking as the court of directors shall, in their discretion, think fit; and shall cause to be done and executed all such acts, deeds and things, as in the opinion of the court of directors shall be necessary or advisable for carrying the said arrangement into effect. Provided, nevertheless, that the court of directors shall be at liberty to continue, for such period as they may think fit, the business of the company, so far as regards all or any of the remainder of the claims and demands on the company arising from assurances annuities or other contracts, and the receipt of premiums, and the benefits of any contract with the company; and to make and carry out such arrangements with bankers and others for managing the business so continued as to the said court shall seem fit, and to invest such bankers and others with all proper powers with regard to the matters and things committed to their charge or management, and from time to time to vary or rescind any such arrangements, and to revoke or vary or enlarge any such powers, and after every or any such rescinding or variations to act in the manner according to the original powers intended to be hereby conferred on the said court, and to make such allowances by way of recompense for their care and trouble to such bankers and others respectively as the said court shall think proper; and likewise upon the discontinuance of the business in regard to any of the remainder of the said claims and demands, premiums, and benefits, to act in relation thereto, and the policies and contracts from which such premiums and benefits respectively shall result, in the manner first authorised by this clause; and if any funds or property of the company shall remain after answering the several purposes aforesaid, the court of directors shall cause the same or so much thereof as shall not consist of money to be sold, got in, or otherwise converted into money, and shall cause the moneys arising from the said remaining funds or property, or of which the same shall consist, to be paid and distributed at such time or times as they shall think fit to and amongst the proprietors and other holders of shares in the capital of the company according to their respective rights and interests therein; and notwithstanding the dissolution of the company, these presents and provisions herein contained, and all powers, privileges, rights, and duties of the proprietors and other holders of shares, including the powers to call and hold extraordinary general courts, and the powers to call for and enforce the payment of further instalments on shares, shall, until all claims and demands shall have been respectively satisfied and provided for as aforesaid, and until a final division shall have been made of the residue, if any, of such moneys as aforesaid, remain and continue in full force so far as the same may be necessary for winding-up the concerns of the company, and for enabling the court of directors to dispose of the funds and property of the company, and to satisfy and provide for such claims and demands, and to make such payments and disbursements as aforesaid.

In 1866 proposals were made for the amalgamation of the Royal Naval, &c., Society with the European Society. This amalgamation was carried into effect by two deeds, both dated the 17th Sept. 1866. By one of these deeds, called the deed of assignment, the business and a certain part of the assets of the Royal Naval Society were assigned to the European Assurance Society; and by the other, called the deed of amalgamation, the European Society undertook to pay and satisfy all the liabilities on life or annuity policies granted by the Royal Naval Society, and all other liabilities present or future of the Royal Naval Society; there was also a covenant by the directors of the European Society that the European Society, their successors and assigns, would, from and out of the

property and assets of the European Society, indemnify the trustees, directors, and proprietors of the Royal Naval Society against all liabilities on life or annuity policies, and against all other debts, liabilities, &c., and there was a further covenant by the European Society to

Pay to each shareholder of the Royal Naval Society his original paid-up capital upon each share in full, but without bonus, by two equal instalments, at six and twelve months respectively, computed from the day of the dissolution of the Royal Naval Society, with interim interest from that date at the rate of 5 per cent per annum.

Each shareholder, however, was to have the option, to be exercised within six months of the dissolution, "of taking his paid-up capital in shares of the European Society," upon certain terms.

Major Lancey held 100 shares in the Royal Naval Society of 25*l.* each, on which 500*l.* had been paid up. After the amalgamation a circular, dated Oct. 1866, was sent to the shareholders of the Royal Naval Society, and amongst others to him. This circular informed him that the amalgamation had been carried into effect, and that he was entitled either to take shares in the European Society of 2*l.* 10*s.* each, with 10*s.* 6*d.* per share paid up, in respect of his Royal Naval Shares, or to receive his original paid-up capital in cash, one-half in six months and one-half in twelve months from the 17th Sept. 1866. He took no notice of this circular.

On the 7th Dec. 1866, Major Lancey died, and in Feb. 1867, his will was proved by Mrs. Lancey, his widow and executrix. On the 15th April 1867, the manager of the European Society wrote the following letter to Mrs. Lancey's son.

The European Assurance Society.

Dear Sir,—As stated in the circular sent you the other day, the agreement between this society and the Royal Naval Society provides that any shareholder electing to take cash in respect of his shares is entitled to receive the original amount paid on them in two instalments. If shares are elected to be taken, an equivalent number of shares in this society will be issued according to the original amount paid and the bonus additions thereon. If you conclude to elect to take shares, there is no doubt that you will be able to dispose of them, if desired, without difficulty. Whether you elect to take cash or shares, it will save time if you send up the certificates of the shares held by the late Major Lancey in the Royal Naval Society.—Yours faithfully,

HENRY LAKE, Manager.

Thereupon Mrs. Lancey, as the executrix of Major Lancey, elected to receive cash in respect of the shares, and, subsequently, she delivered up to the European Society the certificates of the Royal Naval shares, and received from the European Society 525*l.* in respect thereof in two instalments. On the occasion of the last instalment being paid she gave to the society the following receipt:—

Received this 23rd Sept. 1847, of the European Assurance Society the sum of 262*l.* 10*s.*, being the amount of the second and final instalment of my original paid-up capital payable by them to me as the holder of 100 shares in the Royal Naval Society on the register of that company on the 14th Sept. 1866 (when the said company was dissolved) pursuant to the provisions, of a certain deed dated the 17th Sept. 1866, between the said European Assurance Society and three of its directors and the trustees of the said Royal Naval Society, with interim interest from the said 17th Sept. 1866, at the rate of 5*l.* per cent. per annum.

As witness my hand, MARGARET LANCEY,
As executrix of the late Major William Lancey.

Mrs. Lancey's name was never on the register of the Royal Naval Society, and after the amalgamation no dividends were received on the shares and she was under the impression that the shares had been either annihilated or taken over by the European Society.

In the winding-up the name of Major Lancey was at first placed on the list of contributories to the Royal Naval Society and Vice-Chancellor Malins's chief clerk subsequently amended the list by substituting Mrs. Lancey's name. She now applied to have her name removed from the list.

J. W. Chitty appeared for the applicant, and contended that under the deed of settlement the Royal Naval Society had been effectually dissolved, and the shares released from all liability.

Lord WESTBURY.—A part of the 173rd clause is made material as giving a meaning to the term dissolution. Dissolution, supposing it to be carried by the extraordinary general meetings, will only amount to a discontinuance of the business of the society *in futuro*, but the society remains and the partnership contracts remain till the partnership is wound-up; the external creditors having a right to resort to the partners as the persons with whom they contracted, and to press their remedies until they are satisfied.

Chitty.—What I suggest for your Lordship's consideration is whether the terms of the deed are not essentially imported into the policies so that the creditor's contract is satisfied when the terms of the deed are strictly acted on.

Lord WESTBURY.—What I have also to consider is, whether these clauses in the deed of settlement do not in fact amount to this, that the partnership is to be considered as continued, and all powers for winding-up to remain, until the external debts and liabilities are satisfied. The only difficulty that I have found on reading over the deed of settlement is this: An executor, who has not become a proprietor is a suspended owner of the deceased man's shares. What a curious status that is! How far is he or she liable to calls while in that state of suspended animation? With regard to the deed of amalgamation, I see it says that the European Society should "adopt and take over in an effectually binding way, and undertake to pay and satisfy in conformity with the terms of the deed of settlement of the Royal Naval Society all the liabilities on life or annuity policies, &c." You see that contemplates the continuance of the liabilities as engagements against which the Royal Naval Society is to be indemnified.

Chitty.—There is a further point that Mrs. Lancey was an executrix, and therefore, according to the deed, in a position of suspense. As an executrix, she was bound either to become a proprietor or to sell. What took place was a sale, and the 142nd clause provides that "the holder of such share or shares shall be for ever thenceforth acquitted and discharged from all obligations and from all the covenants and agreements."

Lord WESTBURY.—

You see that was an obligation or power, whichever you call it, imposed upon an executor to sell; that means, to sell to another person who may be substituted in the deed of settlement for her deceased testator. She did no such thing. I take it—and I mention it now, in order that we may prevent these applications if possible — to be perfectly clear that, if an individual takes shares in a society of this kind, and then that society is dissolved, or dealt with in any manner you please, unless the dissolution or

the transfer involves a discharge to the creditors of the dissolving society, which discharge binds those creditors, the liability of the partners continues. Whatever you may denominate the transaction, whether you call it dissolution, or whether you call it transfer, if there be a power to dissolve contained in the deed, with a proviso that the dissolution shall not affect the necessary operation of winding-up the society after a resolution to dissolve, and if that be also accompanied with power to the directors to accelerate the dissolution—to consummate the dissolution—by entering into engagements with another company to take over the liabilities; then if that latter power be carried out, and they enter into an engagement with a company to take over the liability, the liability of the shareholders in respect of those debts which are so taken over unquestionably remains. If, however, the creditors of the society so dissolving accede to the transfer and to the proposed indemnity and accept the transferring company, then the indemnifying company are the sole persons liable to the exclusion and in discharge of the persons who originally contracted. Now there is nothing of that kind here, and this unfortunate lady elected to take money for her shares, depending upon the arrangement that had been made with the European. The arrangement with the European was that they would undertake the debts, and also indemnify the persons transferring to them; but in all these cases the old proverb applies, they "reckon without their host," the host being the outstanding creditor, and if he is not brought in and made a party to the transaction, his rights are not prejudiced: they remain and may be enforced hereafter, notwithstanding the arrangement to indemnify, upon which the original debtor relies. That arrangement is, in itself, a confession and acknowledgment that the liability remains, and that the party liable to it is content to rest upon his security. You may diminish the amount of the creditors by showing cases of "novation," as they are called. I am sorry that I can give the applicant no relief. I am very sorry for it. She is in the company of persons very much wiser who did not know their position and have to pay for it.

Montague Cookson appeared for the official liquidators of the Royal Naval Society, and said they had considered the case as concluded by the deed, and had accordingly given notice that they would oppose the application.

Lord Westbury.—It was very prudent of you to do that. I think this lady is in a peculiar situation, being an executrix, and as such executrix never having been upon the register, I think it not an unreasonable thing for her to bring her case before me and have it decided. It will serve as a representative case with regard to all personal representatives in a similar situation. She will have her costs out of the Royal Naval Society.

Solicitor for the applicant, *Mortimer*.

Solicitors for the official liquidators of the Royal Naval Society, *Mercer* and *Mercer*.

Saturday, Oct. 26.

Cathie's Case.

Company—Contributory—Amount of call—Bonus merged in paid-up capital—Companies Act 1862, *s.* 26.

A company's deed of settlement provided that at the end of every three years the profits should be ascertained, and four-twentieths of such profits should "in the first place be apportioned equally to the credit of the shareholders according to the number of shares held by them respectively by way of addition to the amount paid by them respectively upon their shares, and that the shareholders should receive interest at the rate of 5l. per cent. per annum as well on the amount of their paid-up capital, as on such additions thereto, until such additions should amount to a sum equal to twice the amount of the capital paid up at the time of such division of profits, and when and so often as any such four parts or any part thereof should not be required for maintaining such additions at the amount last aforesaid, such four parts of the profits or any part thereof not required for such purpose, should be divided among the shareholders in money;" and there was a provision for paying to the shareholders the share capital with the additions thereto, and for converting the society into a Mutual Assurance Society, in case the triennial additions should amount to a sum equal to twice the amount of the share capital paid up.

Two bonuses of 6d. and 1s. were declared on the shares of 2l. 10s. each, on which 10s. per share had been paid up; and credit for these bonuses was given to the shareholders in their share account in the books of the society.

In the winding-up of the company a call was made on the contributories of all the unpaid share capital.

Held, that under the deed of settlement these bonuses became part of and were merged in the paid-up portion of the capital, and that the contributories were liable on each share to a payment of the 2l. remaining unpaid, less these bonuses of 1s. 6d.

The 26th section of the Companies Act 1862, *which provides for a return to be made to the Registrar of Joint-stock Companies of the amount of calls on each share, does not impose on directors the obligation of making a return of the exact amount of the share capital remaining uncalled up.*

This was a question as to whether in the call that had been made on the contributories to the European Assurance Society of all the unpaid share capital, they were to be credited with the payment of bonuses of 6d. and 1s., which had been paid to their credit in the books of the society.

The deed of settlement of the European Society, dated the 2nd Sept. 1854, provided that the capital of the society should (subject to certain powers therein contained for increasing the same by the issue of new shares), consist of 200,000l. divided into 80,000 shares of 2l. 10s. each. Under these powers the capital of the society was, on the 29th May 1862, increased to 1,000,000l.

The deed of settlement further contained the following provisions:

Clause 20:

That as to the shares for the time being taken in the company, the board of directors may at their discretion from time to time call for the moneys for the time being remaining unpaid thereon at such times and by such instalments as the board shall think proper, and notice of every such call shall be given by circular letter to each shareholder, addressed to his place of abode or business in Great Britain or Ireland, and by advertisement inserted twice at least in some two or more of the morning daily newspapers, published and circulating in London, stating the amount of the instalment or call for the time being called for, the day fixed for the payment of the same, and the place or places at which the same is to be paid, and such circular and advertisement shall operate as

notice of such call to all the shareholders for the time being, and all persons claiming, or to claim through or under them respectively. Provided, nevertheless, that no one call hereafter to be made under the powers for that purpose herein contained shall exceed 10s. per share, and that successive calls shall not be made at a less interval than three months.

Clause 50:

That interest on the paid-up capital of the company at the rate of 5*l.* per cent. per annum shall be paid by the board of directors to the respective shareholders out of the profits of the company in proportion to the shares held by them respectively, to commence running from the date of the payment of the several calls or deposits upon the shares taken and paid upon by the said shareholders, and to be paid yearly or half-yearly, and on such days as the board shall appoint.

Clause 51:

That within six months after the 31st Dec. 1860 and within six months after the 31st Dec. in every succeeding third year the board of directors shall cause a calculation to be made, either by the actuary of the company or such other properly qualified persons as they may appoint, of the amount of the profits which have, by accumulation or otherwise, accrued to the funds of the company up to such 31st Dec. in the year 1860, and on the 31st Dec. in every third year thereafter respectively, and such profits having been so ascertained, the said board shall (if satisfied with the correctness of the calculation, but not otherwise) forthwith divide the same into twenty equal parts, which shall be apportioned in manner following—that is to say, fifteen of the said twenty parts shall be apportioned among the holders of such policies as shall have been effected on the scale of participation in profits . . . .

Clause 52 provided that one of such twentieth parts should be carried to a separate account, called the agents' account, and distributed as extra remuneration among the agents.

Clause 53:

That the remaining four twentieth parts of such ascertained profits shall, in the first place, be apportioned equally to the credit of the shareholders, according to the shares held by them respectively, by way of addition to the amount paid by them respectively, upon their shares, and the shareholders shall receive interest at the rate of 5*l.* per cent. per annum, as well on the amount of their paid-up capital as on such additions thereto, until such additions shall amount to a sum equal to twice the amount of the capital paid up at the time of such division of profits, and when and so often as any such four parts or any part thereof shall not be required for maintaining such additions at the amount last aforesaid, such four parts of the profits or any part thereof not required for such purpose shall be divided amongst the shareholders in money. Provided always, that when and at any time after the triennial additions shall amount to a sum equal to twice the amount of the share capital paid up, it shall be lawful for the board of directors, if they shall think fit, but not otherwise, to call an extraordinary general meeting of the shareholders and members entitled to vote at any general meeting of the company to take into consideration the propriety of altering the provisions of these presents and any other the rules and regulations of the company relating to capital and shares so far as may be necessary, and as it may be lawful for the company to alter the same, so as that the company shall thereafter be a purely mutual assurance company, and provided there shall not be less than thirty shareholders entitled to vote present at such extraordinary general meeting, and two-thirds of such shareholders so present shall so agree and determine, and also two-thirds in the aggregate of all those persons present and entitled to vote, whether shareholders or members, shall likewise so agree and determine, the share capital with the said additions thereto, and any interest then accrued thereon, shall be paid to the shareholders, according to their respective interests, and thereupon the necessary steps shall be taken for converting the said company into a mutual assurance company.

On the 28th May 1863, a bonus of 6*d.* per share was declared on those shares on which 10*s.* per share had been paid up, and credit for the bonus was given to each shareholder in his share account in the books of the society. In April 1867 a further bonus of 1*s.* per share was declared, and the following circular was sent to the shareholders:—

Bonus Notice.

European Assurance Society.

April, 1867.

Dear Sir,—I have great pleasure in announcing to you that the valuation of the affairs of this society to the 31st Dec. 1865, having been completed, a bonus of 1*s.* per share has been declared as the Proprietors' division of the profits.

This having been credited to your share account in the books of the company, in conformity with the deed of settlement, your paid up capital is raised from 10*s.* 6*d.* to 11*s.* 6*d.* per share, on which latter amount the interest will henceforth be payable. . . . . —Yours faithfully, HENRY LAKE, Manager.

In the winding-up of the European Society all the unpaid share capital was called up. Mr. Cathie, a contributory, contended that under the 53rd clause of the deed of settlement these bonuses of 6*d.* and 1*s.* had become part of his share capital and that consequently instead of being liable to a call of 2*l.* per share, he was liable only to a call of 2*l.* less the 1*s.* 6*d.* per share.

All the policies issued by the society contained the following clause:

Provided always that the capital stock of the society, or so much thereof as for the time being shall have been subscribed, and the other stocks, funds, securities, and property, of the said society remaining at the time of any claim or demand made unapplied and undisposed of and inapplicable to prior claims and demands in pursuance of the trusts, powers, and authorities contained in the deed or deeds of settlement of the said society, shall alone be liable to answer and make good all claims and demands upon the said society under or by virtue or in respect of the within written policy and all other policies, and that no director, proprietor, or member of the said society, his heirs, executors, or administrators, shall by reason of any policy of assurance, or instrument securing annuities, or of the whole of the policies of assurance and instruments securing annuities, taken together, which any director has signed, or may sign, be in any wise individually or personally liable or subject to any claims or demands against the said society beyond the amount of the unpaid part of his particular share or shares in the said capital stock, or in such part thereof as for the time being shall have been subscribed.

The Companies Act 1862 provides for a return to be made to the Registrar of Joint-stock Companies of the calls made on each share.

Sect. 26:

Every company under this Act, and having a capital divided into shares, shall make once at least in every year a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company, and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars:

(3) The amount of calls made on each share.
(4) The total amount of calls received.
(5) The total amount of calls unpaid.

Montague Cookson, for the official liquidators of the European Society.—It is true, that in the books of the society the shareholder is credited with these bonuses as a part of his paid-up share capital; but the peculiar form of book-keeping adopted by the directors cannot alter the nature of the liability of the shareholder. That liability must depend on the true construction of the deed of settlement. The official liquidators contend

that the 53rd clause of the deed must be interpreted thus:—The amount of divdends not paid out to the shareholders from time to time in cash, was intended to be detained by the society as a reserved fund, bearing interest at the rate of 5 per cent. to which interest the shareholders are entitled as it accrues, but that until such fund attains the maximum fixed in the deed at twice the amount of the paid-up share capital, no part thereof is to be paid to the shareholders in money, but it is to remain in the hands of the society as money invested by the shareholders with the society, yielding 5 per cent. The clause speaks of the apportionment being made "by way of addition to the amount paid by them on their shares," but these words seem to imply that the amount paid up is one thing, and the added fund is another. There is nothing pointing to a substitution of a sum of money laid by for that money which is in the pockets of the shareholders and is demandable from them from time to time in the shape of calls as the exigencies of the society require. It is a fund retained for the shareholders, to which they no doubt will be ultimately entitled when the maximum is reached, or they will be entitled to corresponding benefits by reason of the resolutions of an extraordinary meeting which may be passed, and in the mean time it is something fructifying for the benefit of the shareholders in the coffers of the society, and yielding interest at 5*l.* per cent. To construe these words in the manner contended for by Mr. Cathie amounts in effect, to an authority in the directors to reduce the subscribed capital of the shareholders by the amount so set apart, and so to bring about an alteration of one of the fundamental elements of the society's constitution, which fixes the subscribed capital. With regard to the credit given for the bonuses being equivalent to a call of 1*s.* 6*d.* per share, the deed of settlement provides a special machinery for the purpose of making calls; they are not to be made except at stated times and at certain intervals, and if these dividends were intended as a substitution for calls, this would have been distinctly expressed. The general assets of the society is the fund to which the policy-holders and other creditors are entitled to look for their security. If dividends have not been received by the shareholders they remain part of the general assets of the society, and are as much applicable to the payment of debts as the amount of calls actually paid or the premiums paid. It matters not how, whether by a special arrangement or by some accident, the dividends of a shareholder have not been received, he cannot claim to set off the amount against his liability for the sum remaining due upon his shares, though he might be entitled to prove against the society in respect of such unreceived dividends. As against the policy-holders and creditors of the society, nothing more has been done with respect to these bonus additions than to abstain from distribution. There is no indication in the deed that the bonus is to be *deducted* from the unpaid capital; there is to be an *addition* to paid-up capital, but this addition is made merely to ascertain the total amount on which from time to time interest is to be calculated. There was to be no merger or substitution; that the triennial additions were to be kept distinct is shown by the provision for what was to take place when they should amount to a sum equal to twice the paid-up share capital. Moreover, in the returns to the Registrar of Joint Stock Companies, these additions were not treated as part of the paid-up share capital; and under the 26th section of the Companies Act 1862, it was incumbent on the directors to make a return of the total amount of calls made on each share, the total amount of calls received, and the total amount of calls unpaid. [Lord WESTBURY.—Those are calls actually made. This is not a call. In order to make this apply, you must show that it contains an obligation to state the actual amount of the share capital of the company remaining unreceived.] Remaining unreceived in the shape of calls. [Lord WESTBURY.—No; remaining unerceived, liable, of course, to be paid thereafter.] Any creditor inspecting such a return as is here made, and finding that the call made on each shareholder amounted to 10*s.* per share, would conceive, as the shares were 2*l.* 10*s.* each, that there was 2*l.* yet to be called up; that would be matter of inference, but the fact would be, if your Lordship held that this section is conclusive in favour of Mr. Cathie, that there was paid up on that share 10*s.* and 1*s.* 6*d.* besides, making together 11*s.* 6*d.* The creditor would be deceived by the return in that particular. He would think he had a fund of 2*l.* per share to fall back upon in respect of share capital, which by the terms of the policy is liable to his claim, whereas he would only have 2*l.* less 1*s.* 6*d.* [Lord WESTBURY.—If that be so—but I do not agree to that being the interpretation—he might have cause of complaint against the directors. He could have no ground for forfeiting the amount credited to Mr. Cathie and making him pay it over again.] I will only say in conclusion that the official liquidators do not wish to take advantage of any ambiguity in the terms of the deed. The question will involve a very large sum of money. The 1*s.* 6*d.* is only the basis of calculation.

Lemon appeared for Mr. Cathie, but was not called on.

Lord WESTBURY,—

This is a very important point. It was quite right that the official liquidator should bring it forward. The claim is in effect this—that the amount of profit credited to a shareholder as an item belonging to the shareholder is not to be included in the same sum with the item of amount due from the shareholder, but is to be treated as an independent thing. If it were capable of being so separated, or if any meaning could be given to the clear words of the 53rd clause in the deed of settlement that would admit of a different interpretation from that which makes the amount of the profit the sum to be deducted from the share capital still due from the shareholder—if anything of that kind could be found, then I admit that the whole amount of the unpaid share capital must be brought in by the shareholder into this liquidation, and that he must be left to pursue his remedy in respect of the amount assigned to him for profit in the ordinary way against the society. It could not in that case be made the subject of a set-off. But the matter is concluded; for the whole operation is distinctly defined by the 53rd clause of the deed. And I think this is the only matter to be appealed to in this question, which is one between the shareholder and the society. Mr. Cookson very properly drew my attention to the fact that if we admitted of these things being done in the book-keeping of the directors, and they did not appear

in the return to the Registrar, a very unfair result would be the consequence with respect to creditors consulting the register in order to ascertain the means of the company; because they would suppose, when they found that 4*l.*, we will say, was due originally from every shareholder, and that 3*l.* only had been paid, that there was 1*l.* remaining due. But when we look at the words of the 26th section, of the Act of 1862, they are certainly not sufficient to impose in terms upon the directors the obligation of returning the exact amount of the share capital remaining uncalled for. It is true that there is an obligation to state the amount of the calls, but it is equally true that every person contracting with this society, every person entering into an engagement with the society, must be taken to have entered into that engagement with a knowledge of the provisions of the deed of settlement, and if attention be directed to this 53rd section, inquiry would naturally be made how much of the share capital remaining uncalled for has been diminished or actually paid by these directions, which order that the amount of the profit assigned to each shareholder, if not taken by the shareholder, shall be credited to him as an addition to the amount paid by him on his shares. When it is credited to him as an addition to the amount paid, we have described in very accurate language the process of keeping the account. Suppose an account opened with him originally in respect of four shares amounting to 100*l.*, then he would be debited on one side of the account with the amount of those four shares, or 100*l.* He would be credited on the other side of the account, let us suppose, with three calls of 25*l.* each, including the original subscription in respect of those shares. His account, therefore, would show that 25*l.* remained due from him. Then there is a profit declared on the shares of 1*l.* on each share, and then, according to the directions of the deed, as soon as that profit is declared, the directors are bound to enter the amount in addition to the amount paid. Suppose the profit be 4*l.*; then the last entry would be, after the three entries to his credit of 25*l.* each, 4*l.* to his credit; and then, I suppose that this involves, what is the necessary consequence, that you must sum up the amount on the one side, and sum up the amount on the other side, and the balance will represent the sum that is due from the shareholder. And that balance so represented in conformity with this deed is the amount of the call that can now be made on him, and no more. But then, it is quite clear that the amount of the profits no longer preserves a separate existence, nor has an independent identity. It is merged in the sum that is paid, by the force of the words that it is to be taken as an addition to the amount paid. After that has been done, it will be no longer competent to the shareholder to call for that as the subject of an individual payment to him. It is merged in the account of what he has paid, and he can no longer get it as a separate debt. Well, then, he is to have interest on it, just as he has interest on the other payments that he has made. So that the whole thing is treated from beginning to end as a sum no longer to be regarded with reference to its origin — namely, profits—but to be regarded as an additional payment merged together with the payments already made in one total, which is to be deducted from the total of the amount of the shares with which the shareholder was originally debited. We are bound, especially in a matter of this kind, to give a plain, common sense, obvious interpretation to language. But if I had been in the situation of Mr. Cathie, supposing him to have had a profit of 4*l.* which he had not received, but permitted to be thus credited in addition to what he had paid, I should have said, "There is due from me the 25*l.* in respect of my shares minus the sum of 4*l.* which has been credited to me, and is to be deducted therefrom." The balance represents what we are entitled to call on Mr. Cathie to pay. There must be a declaration to that effect, that Mr. Cathie is liable to a call for the balance of the amount of his shares after deducting the sums paid and the amount of the profits which, by the 53rd clause of the deed, is to be added to the amount paid. For the balance he is liable to a call. I suppose this, of course, has been agreed on as a representative case.

Montague Cookson.—Yes, my Lord.

Lord Westbury.—Then, you must have your costs out of the assets of the European Society.

Solicitor for Mr. Cathie, *J. Tucker.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Saturday, Oct. 26.

Michael Brown's Case.

Company—Winding-up—Contributory—Liquidation by arrangement—Bankrupt shareholder—Disclaimer of shares—Bankruptcy Act 1869, *s.* 23 *—Liability of bankrupt shareholder to contribute to costs of winding-up a company after disclaimer of shares.*

A petition to wind-up the E. Company was presented on the 10*th June* 1871, *and an order to wind-up was made on the* 12*th Jan.* 1872. *In the interval on the* 28*th Oct.* 1871, *a holder of* 800 *shares presented a petition in a County Court for liquidation of his affairs by arrangement. The general meeting of his creditors was held on the* 14*th Nov.* 1871, *and at this meeting a special resolution was passed for the liquidation of the debtor's affairs by arrangement, a trustee was appointed, and the debtor's discharge was granted. The E. Company were represented at this meeting by their solicitors, and proved for* 636*l.* 3*s.* 9*d. in respect of calls then due on the* 800 *shares, and for* 800*l. in respect of the liability of* 1*l. per share not yet called up. The assets of the debtor were stated at* 4*l., and his liabilities at* 2393*l.* 2*s.* 1*d.*

On the 16*th Nov.* 1871, *the registrar certified the discharge of the debtor, and on the same day the trustee disclaimed the shares under the* 23*rd section of the Bankruptcy Act* 1869.

In the winding-up of the E. Company, the official liquidator claimed that, notwithstanding the disclaimer of the trustee, and the proof of the company in respect of liability as to share capital, the debtor was liable to be placed on the list of contributories in respect of the costs of winding-up the company.

Held, that there was no ground for placing him on the list.

Quære, whether the debtor would not have been under some liability, if the company had not proved.

In 1871, Michael Brown held 800 shares in the European Assurance Society. On the 10th June 1871, a petition was presented for winding-up the

society, and on this petition an order to wind-up was made on the 12th Jan. 1872. Pending the proceedings on the petition, on the 28th Oct. 1871, Michael Brown presented a petition in the Stockport County Court for liquidation of his affairs by arrangement, under part 6 of the Bankruptcy Act 1869. The general meeting of creditors was held on the 14th Nov. 1871, and the following special resolutions were passed by the statutory majority of the creditors present:

1. That the affairs of the said Michael Brown shall be liquidated by arrangement, and not in bankruptcy.

2. That Mr. Joseph Barratt shall be and is hereby appointed trustee.

3. That the discharge of the said Michael Brown shall be, and the same is hereby granted.

4. That the said Joseph Barratt shall be intrusted with the registration of these special resolutions.

Subsequently these resolutions were duly presented to the registrar of the Stockport County Court, and were registered in accordance with the provisions of the Bankruptcy Act 1869.

At this meeting of creditors the European Society were represented by their solicitors, and brought in their proof against the estate for the sum of 636*l.* 3*s.* 9*d.* in respect of calls then due upon the 800 shares, and interest upon such calls, and for the sum of 800*l.* in respect of the liability of 1*l.* per share not yet called up.

On the production of the statement of the debtor, it appeared that his assets amounted to 4*l.* and his liabilities to 2393*l.* 2s. 1d.

The Registrar of the Stockport County Court certified on the 15th Nov. 1871 that Mr. Barratt was appointed, and thereby declared to be trustee in the liquidation by arrangement. And on the following day, the 16th Nov. 1871, he further certified that the discharge of Michael Brown was granted. On the same 16th Nov. 1871 the trustee, under the 23rd section of the Bankruptcy Act, 1869, disclaimed, by a writing under his hand, the 800 shares held by the debtor at the date of the appointment of the trustee, and on the 17th Nov. 1871 he served the society with a duplicate of the disclaimer, the share certificates being attached thereto.

The questions for consideration were stated in the "case" as follows:—

1. Having regard to the 23rd, 31st, and 125th sections of the Bankruptcy Act, and to the disclaimer under the hand of the trustee under the 23rd section, and to the fact of the liquidators having proved in respect of the call which was due and in respect of the future liability —is the order of discharge under the hand of the Registrar a discharge to the said Michael Brown in respect of the calls which were due prior to the 14th Nov. 1871 and the date of the granting of such order of discharge?

2. Whether such order of discharge as aforesaid is a discharge against any future liability for calls arising subsequent to that date and to the date of such order of discharge?

3. Whether, having regard to the 31st section of the Act, the liability of the contributory to contribute to the costs of the liquidation can, for the purposes of this Act, be deemed a debt proveable in bankruptcy as being a liability incapable of being fairly estimated, and whether the disclaimer and order of discharge are a discharge to the said Michael Brown in respect of this liability?

4. Whether the name of the said Michael Brown or the trustee, or either of them, ought to be placed on the list of contributories?

The third question, as to the liability in respect of the costs of winding-up, was however the only one considered.

The provisions referred to in the Bankruptcy Act of 1869 are the following:

Sect. 23:

When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer, the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication; and if the same is a lease, be deemed to have been surrendered on the same date, and if the same be shares in any company, be deemed to be forfeited from that date, and if any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the court, and the court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy.

Sect. 31:

Demands in the nature of unliquidated damages, arising otherwise than by reason of a contract or promise, shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt, shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.

Save as aforesaid all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy, by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy. An estimate shall be made according to the rules of the court for the time being in force, so far as the same may be applicable, and where they are not applicable at the discretion of the trustee, of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

Any person aggrieved by any estimate made by the trustee as aforesaid, may appeal to the court, and the court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such order being made, such debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy, but if the court think that the value of the debt or liability is capable of being fairly estimated, it may direct such value to be assessed with the consent of all the parties interested, before the court itself, without the intervention of a jury, or if such parties do not consent, by a jury, either before the court itself or some other competent court, and may give all necessary directions for such purpose, and the amount of such value, when assessed, shall be provable as a debt under the bankruptcy.

"Liability" shall, for the purposes of this Act, include any compensation for work or labour done, any obligation, or possibility of an obligation, to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur, or capable of occurring before the close of the bankruptcy, and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of

resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion.

Sect. 125 provides for the regulations with respect to liquidation by arrangement.

The provisions in the Companies Act 1862, relating to bankrupt shareholders, are the following:—

Sect. 75:

The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound-up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability; and it shall be lawful, in the case of the bankruptcy of any contributory to prove against his estate, the estimated value of his liability to future calls, as well as calls already made.

Sect. 77:

If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding-up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any moneys due from such bankrupt in respect of his liability to contribute to the assets of the company being wound-up. . . .

Sect. 153:

Where any company is being wound-up by the court, or subject to the supervision of the court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the *status* of the members of the company made between the commencement of the winding-up and the order for winding-up, shall, unless the court otherwise orders, be void.

Montague Cookson appeared for the official liquidators of the European Society, and stated the facts of the case. [Lord WESTBURY.—Can such things be done now? This was no doubt a proceeding to get rid of the 800 shares. I thought we had a model bankruptcy law. A man makes a voluntary bankruptcy on the 28th Oct., exhibits some thousands of debts and 4*l.* of assets, and within a fortnight or three weeks his creditors give him a discharge. Who collected these creditors? Who packed them?] There are the provisions of the Act of 1869. Whether there is any equity that lies behind, which might apply to the case, I do not pretend to say; but, as a matter of practice, your Lordship will find, if you inquire, that it is not at all uncommon. We have not been able to impeach the regularity of the transaction. The statute seems careful to allow these proceedings to be taken. [Lord WESTBURY.—Who made the proof? How could the society prove after it was in a state of suspense?] I apprehend they treated themselves as a going society till the winding-up order paralysed their power. [Lord WESTBURY.—Are you struggling to have an infinitesimal dividend out of the 4*l.* of assets?] No, my Lord. This case is taken as a representative case. There may be many other persons in a position of solvency, against whom it might be material to prove for the costs of liquidation. The case is presented to your Lordship more for the purpose of obtaining your Lordship's direction than for any other purpose. I submit that the society was entitled to consider as late as the 14th Nov. 1871, that it would continue to carry on business, and the remote claim that might arise from the costs of the liquidation, would not, I submit, be a contingency properly provided for, even under the words of the 31st section of the Act of 1869, although they go considerably beyond any words employed in any prior Bankruptcy Act. [Lord WESTBURY.—I understand you to say that the future costs of liquidation were only matured into something like a certainty by the operation of the winding-up order, and therefore it was not a measurable demand, capable of being proved against the bankrupt's estate. But then what do you want me to do? Do you want me to keep the bankrupt here as a contributory?] That will be our right, I apprehend, if he has not been discharged in respect of this remote liability. [Lord WESTBURY.—Otherwise, see how you have been going on. Look at this extraordinary section of the Bankruptcy Act of 1869, and you see it says that on the execution of such disclaimer, that is by the trustee, the property disclaimed shall, if the same be shares in any company, be deemed to be forfeited as from that date. There was a disclaimer, and accordingly the shares of the bankrupt are annihilated.] Yes, but the forfeiture of the shares, where there is anything due on them, does not exonerate from the payment. [Lord WESTBURY.—I quite agree to that; but you are not coming here for anything due, but for something that may at some time hereafter become due. There can be no possibility of liability to costs unless there be a continued ownership of shares, and here the shares are forfeited by this provision.] If we could have foreseen the impending liquidation, we should have known exactly what to do. I do not know whether it would be necessary or possible to retain the bankrupt's name on the list of contributories, as the necessary condition of a reservation, on the part of your Lordship, of the society's right to add to their proof in respect of these newly discovered costs of liquidation. Certainly we cannot say that there is a right to put the trustee on the list after the disclaimer, which he executed on the 16th Nov. 1871. [Lord WESTBURY.—Can I over-reach the transaction altogether by the retrospective operation of the Companies Act 1862, and carry it back to the presentation of the petition?] The 75th section of the Act of 1862 provides that it shall be lawful, in the case of the bankruptcy of any contributory, to prove against his estate the estimated value of his liability to future calls as well as calls already made. It does not touch costs, and it also seems to imply that the winding-up order must be made previous to the proof, because the word "contributory" is used, and thus pre-supposes a winding-up order. And it has been decided that as regards a going company, future liability to calls cannot be proved, because it is not a thing that can be estimated under the 75th section. The 77th section says that if any contributory becomes bankrupt his assignees are to be deemed contributories. This section would authorise the placing of the trustee on the list of contributories. [Lord WESTBURY.—If the shares were *in rerum naturâ;* but they have been annihilated.] But the 153rd section of the Companies Act precludes them from being annihilated between the presentation of the petition and the date of the winding-up order.

Lord WESTBURY.—The section says:

All dispositions of the property, effects, and things in action in the company, and every transfer of shares, or alteration in the status of members of the company made between the commencement of the winding-up, and the order for winding-up shall, unless the court otherwise orders, be void.

Now, can a statutory forfeiture be deemed a transfer?

Montague Cookson.—I think not; but may it not be deemed an alteration of the status of the members of the company? [Lord WESTBURY.—If it is an alteration made under the operation of a subsequent statute, I am afraid they have been too clever for you in their generation. Last session we found out another difficulty similar to this—of the enactment with regard to leasehold estates, that had the most wonderful effect—it left an unfortunate landlord without the power of alienating.] The conflict is, as your Lordship has pointed out, between the 153rd section of the Companies Act 1862, and the 23rd section of the Bankruptcy Act of 1869. If the 23rd section overrides the 153rd section, or modifies it to this extent, that forfeiture can take place after the presentation of the petition, then it is quite clear that the effect of that holding would be to increase the number of proceedings by voluntary liquidation; but what has to be considered is, whether the 153rd section may not remain unimpaired in respect of its provision as to the non-alteration of the *status* after the presentation of the petition, notwithstanding the 23rd section of the Act of 1869.

Lord WESTBURY.—You see, Mr. Cookson, the Legislature, and persons who have been calling out for a great alteration of the bankruptcy laws, have got so far advanced that those who entertain the old notions of what was just and right to be done, are unable to find the means of satisfying the demands of justice. Now if this case were to be judged according to the principles of equity and the rule of what is right, what I should direct to be done would be this—first, I should direct an application to be made to set aside the bankruptcy and the proceedings thereunder, as having been collusive and designed with a fraudulent intent; and if that were done, the whole thing would fall to the ground. Then this gentleman would be dealt with as an owner of shares. But if that cannot be done, and I certainly see no way of doing it now, especially after the unwise step of proving this large debt against a man who confesses property only to the amount of 4*l.*, and whose confession was believed and acted upon by his creditors, what an idle thing it would be to attempt to pursue this person for his liability to contribute to the future expenses of this liquidation. You cannot prove in respect of the possible liability to future costs; and that is all you now represent.

Montague Cookson.—I suppose my friend would say that under the 31st section we might have carried in a proof of that kind, and that, having omitted to do that, we are concluded.

Graham Hastings, who appeared for the bankrupt, Michael Brown, and for the trustee, said that the 23rd section provides that proof might be made for any injury that is inflicted on the company.

Lord WESTBURY.—I understand that, and that is why this wise company have gone in under your most profitable arrangement, and have proved an estimate of this liability to the tune of 1500*l.*, or something like that, and having already done that—about as idle a thing as could have been done—they now seek to do another idle thing, namely, prosecute you for an imaginary liability to imaginary costs, to be ascertained at, I am afraid, an imaginary time, for they can only be ascertained when all these proceedings are wound-up.

Montague Cookson.—I can hardly conceive that the Legislature, in passing the Act of 1869, could have intended to give such scope to the forfeiture clause as to enable any shareholder in the company, immediately he finds, by the presentation of the petition, that the company is in danger, to proceed to voluntary liquidation, and on getting a trustee appointed to forfeit his shares, and then say he might alter his *status* notwithstanding the 153rd section of the Companies Act.

Lord WESTBURY.—I should have thought not. And having the power to pack his creditors, he gets a complete and effectual discharge within a few days after the commencement of the proceedings upon the production of 4*l.*

Montague Cookson.—I feel a difficulty in dealing with this case, but there are many other cases of the same kind, and, if I might venture to suggest to your Lordship, I would propose that this case, so far as it seeks to determine the conjoint effect of the 153rd section of the Companies Act 1862, and the 23rd section of the Bankruptcy Act 1869, should stand over for discussion on a proper representive case.

Lord WESTBURY.—Bring me a case in which you have not condoned the whole matter by a proof—in which there really is some reason to apprehend that it was an honest case of bankruptcy, to be dealt with accordingly. As to this case, although it has all the elements of a collusive proceeding, yet I cannot deal with it. Mr. Brown has been very well advised, and has been a very fortunate man. Mr. Read's ingenuity did not approach to anything like this: (*vide Read's case, supra* p. 10). It is very fortunate for Mr. Brown that the Legislature has passed such a good-natured statute. You can do nothing.

Montague Cookson.—I am told that it will be a rather difficult thing to select a case that is not embarrassed with the imputation of collusion.

Graham Hastings.—There are something like fifty cases. In every case the European Society has either subscribed the resolutions or has proved.

Lord WESTBURY.—

You would have no such proof as you have made but for the disclaimer. You adopt the disclaimer, and you say, "That gives me a title to prove," and then you rush in to prove without the smallest attention to the payment. As to the attempt to prove for future costs, it must fail. The bankrupt cannot be regarded as a person that would represent that liability, because his shares have been forfeited. The trustee cannot be regarded as a person to represent that liability, for nothing has passed to him. He has faithfully done what it was intended he should do, disclaimed the shares in order that they might be annihilated, and that his friend, the bankrupt, might be relieved from liability; and the society have adopted it all, and have brought the matter to such a pass that it is hopeless to attempt to do anything with it. I shall make no order whatever.

Montague Cookson.—Perhaps your Lordship will give an opportunity to the official liquidator, if he can select a case less embarrassing in its details than this, of bringing out the point whether the 153rd section of the Companies' Act 1862, and the 23rd section of the Bankruptcy Act 1869, are to be construed so as to permit this alteration of the *status* after the presentation of the petition to wind-up.

Lord WESTBURY.—Yes, if there had been no proof, and the case had been presented to me as one in which we had now to decide what the operation of the winding-up order should be on these intervening proceedings, it would have been a very proper case indeed. Even then I could not have touched it without something directed to set aside the proceedings in bankruptcy, in order to get rid of this disclaimer, which, whilst it remains undischarged is the foundation of the forfeiture of the shares.

Graham Hastings.—Mr. Brown has been placed on the list of contributories. I ask your Lordship for a declaration that he is to be removed.

Lord WESTBURY.—You will come to that by and by. I shall not touch him, that is, on this occasion. I will not make an order that he ought to be placed there, but if he is there, let him get off as he can. The joint official liquidator had better look for a more fortunate combination of circumstances, if he can find one. I give him no direction, except that in this unfortunate case, no order can be made. With regard to the costs, as the case has been brought here by arrangement as a representative case, Mr. Brown must have his costs.

Solicitors for Mr. Brown, *Dangerfield* and *Fraser*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

Tuesday, Oct. 29.

LLOYD'S CASE.

Company—Winding-up — Contributory — Informal transfer of shares—Power of directors to reject transferee.

The provisions in the deed of settlement of the E. Company for the transfer of shares, were that a shareholder wishing to transfer his shares was to give to the directors notice of his wish, and to request the directors to certify their approval or disapproval of the proposed transferee, and such notice was to describe the full name and the profession or calling, and the place of abode of the proposed transferee, and if the proposed transferee should be approved of, or if the directors should not within fourteen days propose some other person to take the shares at the market price (in which case the person so proposed should be considered as approved of by them), then the shareholder might, according to a form to be sanctioned by the directors, transfer his shares to his own proposed transferee, who thereupon should, on executing, at the office of the company or at some other prescribed place, the deed of settlement or a covenant to abide by the provisions of the deed, be entitled to call upon the directors to place his name on the register of shareholders as the proprietor of such shares; and no share was to be transferred to any person who had not been first approved of, or considered as approved of by the directors, and if any transfer should be made or attempted to be made to any person, who had not been so first approved of, such transfer was to be void.

Petitions to wind-up the E Company were presented in 1869 *and* 1870, *but they were unsuccessful.*

On the 23*rd July* 1870, *L. sent a notice of his wish to transfer* 630 *shares to J. described in the notice as a "wine merchant," and at the same time he enclosed a transfer, executed by him, of those shares to J. in consideration of* 5*s. On the* 26*th July* 1870 *the directors wrote to L. that they disapproved of the proposed transferee, and would not consent to the transfer. On this a correspondence ensued with respect to the registration of the transfer, but the directors only repeated their refusal to sanction the transfer. They had on inquiry found that the description of the proposed transferee in the notice as a wine merchant was wholly inaccurate, and that he appeared to be in embarrassed circumstances. On a call being made, L. refused to pay it, and an action was brought by the company to recover the amount: and thereupon L. filed a bill in Chancery to restrain the action. On the* 12*th Jan.* 1872 *an order to wind-up the company was made on a petition presented on the* 10*th June* 1871. *In the winding-up L. claimed that he was not liable to be put on the list of contributories, inasmuch as on the expiration of a fortnight from the giving of notice, he was entitled to dispose of his shares either to his proposed transferee or to a transferee proposed by the directors, and accordingly the transfer would have been effectually completed and registered but for the action of the directors:*

Held, that L.'s name must be placed on the list of contributories.

The provisions in the deed of settlement with reference to the transfer of shares were interpreted to mean that the right to transfer arose only when the directors expressed their approval, or neglected to express their disapproval and to substitute another transferee within a fortnight: but in case they expressed their disapproval within a fortnight, then no right to transfer arose. Thus no right to transfer ever arose to L.

Moreover the disapproval of the proposed transferee by the directors was held to be warranted by every sense and feeling of the duty that they owed to the shareholders.

THIS was a question as to the liability of Mr. Lloyd to be placed on the list of contributories to the European Assurance Society.

The deed of settlement of the society provided in clauses 96 and 97, that any shareholder might give notice in writing to the directors of his wish to transfer his shares, and request them to certify their approval or disapproval of the person to whom he proposed to transfer the shares; in the notice he was to describe the full name and the profession or calling and the place of abode of the proposed shareholder, and if such person should be approved of, or if the directors should not, within fourteen days, propose some other person to take the shares proposed to be transferred at the then market price (in which case the person so proposed should be considered as approved of by them), then the shareholder might, according to a form to be sanctioned by the directors, transfer the shares to his own proposed transferee, who thereupon might, on executing at the office of the company or at some other prescribed place, the deed of settlement or a covenant to abide by

the provisions of the deed, be entitled to call upon the directors to place his name on the register of shareholders as the proprietor of such shares, and no share was to be transferred to any person who had not been first approved of or considered as approved of by the directors, and if any transfer should be made or attempted to be made to any person who had not been so first approved of, such transfer was to be void: (*vide* clauses 96 and 97, *sup.* p. 11.)

In 1869 and 1870, petitions were presented to wind-up the society, but they were unsuccessful. In June 1870, Mr. Lloyd, being a holder of 630 shares in the society, executed a transfer of them to Arthur Jackson, and sent the transfer to the society, with a request that it might be registered. The secretary of the society thereupon informed him that it was necessary to fill up a form of notice of intention to transfer, before the directors issued any form of transfer. Mr. Lloyd requested to have his transfer returned to him for the purpose of consulting it, in order to state the particulars required in the form of notice. The transfer was sent back to him, and on the 23rd July 1870, he sent to the society the notice paper filled up, together with another transfer of the shares. By this transfer, which was executed on the 18th July 1870, Mr. Lloyd tranferred his 630 shares to Arthur Jackson in consideration of 5*s*. The description of the transferee in the notice and in the transfer was Arthur Jackson, of No. 43, Tavistock Terrace, Upper Holloway, in the county of Middlesex, Wine Merchant. On the 26th July 1870, the secretary of the society wrote to Mr. Lloyd as follows:

Dear Sir,—The directors have looked in the Directory and do not find the name of the proposed transferee. They have also inquired, and cannot obtain any satisfactory account of him. Under these circumstances the directors, though desirous of facilitating any arrangement proposed to be made by the shareholders, cannot, in the due performance of their duty, consent to the transfer.—I am, dear Sir, yours faithfully,

D. EASUM, Secretary.

H. W. Lloyd, Esq.

Thereupon Mr. Lloyd protested against their refusal to accept the transferee, and a correspondence ensued between the secretary and Mr. Lloyd, in the midst of which the secretary informed him that pending the proceedings on a petition that had been presented to wind-up the company, nothing could be done with reference to the transfer. On the 1st Nov. 1870, the secretary again informed Mr. Lloyd of the refusal of the directors to sanction the transfer:—

Dear Sir,—The directors are advised that the proposed transferee is not a proper person to take a transfer of the shares in question; that he is not to be seen at his nominal place of business, and from this and other facts which have come to their knowledge the directors decline to sanction the transfer. I therefore return the deed, certificates, and 1*s*. stamps, the fee paid.—Yours faithfully,

D. EASUM, Secretary.

Up to this date all calls had been paid by Mr. Lloyd, but on a call being subsequently made he refused to pay it, and, thereupon the society commenced an action against him in the Court of Common Pleas, for the purpose of recovering the amount. On the 26th Oct. 1871, Mr. Lloyd filed a bill in the Court of Chancery to restrain the action, and to compel the society to register his transfer. On the 16th Nov. 1871, a motion was made in this suit to restrain the Europeau Society from continuing the action in respect of the calls, and on the society's undertaking not to continue the action, an order was made for motion to stand over till the hearing of the cause.

On the 12th Jan. 1872, an order to wind-up the society was made on a petition which had been presented on the 10th June 1871. In the winding-up, the official liquidators contended that Mr. Lloyd's name must be included in the list of contributories, on the ground that the directors had, within a fortnight after receiving the notice of his wish to transfer, informed him of their disapproval of the proposed transferee, and accordingly, under the 96th and 97th clauses of the deed of settlement, Mr. Lloyd was not entitled to transfer his shares to Mr. Jackson. They, moreover, relied on the fact that the true consideration was not stated in the transfer which was sent to the society; for it now appeared that instead of Mr. Jackson paying 5*s*. for the shares he was, on the registration of the transfer, to receive 20*l*. from Mr. Lloyd. Further, in the notice of the wish to transfer, and in the transfer that was forwarded, the calling of Mr. Jackson was stated as that of a wine merchant. But the inquiries of the directors at the time of the proposed transfer showed that he had formerly been merely a clerk in a wine company, which was then in liquidation; and that he then had had two rooms for a short time with the name of Jackson and Co. on the door: but these offices were usually kept locked, and were only opened by some person who came occasionally to fetch letters from the letter box. Moreover, Mr. Jackson appeared to be in embarrassed circumstances. Beyond this they were unable to obtain any information about him.

Mr. Lloyd, the applicant, stated in his evidence:

I never knew Mr. Jackson personally. I knew him through my lawyers. I never had any direct communication with Mr. Jackson. I knew of him simply what my lawyers told me, that he was a person of respectable position. I only knew what his residence was, or had been, from what I was told by my lawyers. I only know as to any change of residence, what my lawyers told me. The bargain between myself and Mr. Jackson was that he was to take my 630 shares at a nominal value of 5*s*., and that I was to pay him 20*l*. on the transfer being registered by the society. The bargain was made through my lawyers. I only knew that it was so made through their telling me so. The bargain was made in July 1870. I was at that time desirous of finding a purchaser for my shares in this society, and the bargain with Jackson was that he should take all I held. I was indifferent as to who became the purchaser. My only object was to get rid of them. It was an object to me then to get rid of them, because I had lost my confidence in the society. I thought that most probably it was then insolvent. I was looking for a purchaser to take all my shares off my hands on any terms.

As far as I know and believe, he was a wine merchant. I have heard he has changed his profession since.

I have heard that he is in receipt of a salary in some capacity in a telegraph office. I never knew of my own knowledge anything of Mr. Jackson's place of business. I have heard that he had a nominal place of business. I do not know now where that nominal place of business is or was.

Hemming appeared for Mr. Lloyd, and contended that the meaning of the 96th and 97th clauses of the Society's deed of settlement was that a shareholder was entitled to free himself from all liability on his shares within a fortnight by transferring them either to a transferee proposed by himself or to a transferee substituted by the directors. The directors had no authority to reject any person to whom the shareholder pro-

posed to transfer his shares unless they substituted another. This appears from a similar clause in— .

Re Accidental Death Insurance Company; Chappell's case, L. Rep. 6 Ch. 902; 25 L. T. Rep. N. S. 438.

[Lord WESTBURY.—The two clauses are perfectly distinct. The course prescribed to the directors on the rejection is in that case imposed on them as an obligation. I can understand the meaning of Lord Justice Mellish's observation in that case; it is only an *obiter dictum*, which, if it had applied to this deed, I should not have at all accepted.] You cannot imply a general power in the directors to reject a proposed transferee whom they may consider unsatisfactory. Any such power must be given expressly.

Re Smith, Knight and Co.; Weston's case, L. Rep. 4 Ch. 20; 19 L. T. Rep. N. S. 337.

Mr. Lloyd was accordingly entitled to divest himself of all liability in respect of the shares, and he took every step that he could in order to carry out his wish to transfer. It is the fault of the directors that the transfer was not fully completed and registered. That being so, Mr. Lloyd is entitled to have that considered as done which would have been done but for the neglect of the directors. And accordingly his name must not be included in the list of contributories. With regard to the mis-statement of the consideration, that cannot invalidate the transfer, especially as it was a custom of the Society to recognise transfers in which the money consideration was not stated. And with regard to the alleged misdescription of the proposed transferee in the notice and in the transfer, the description was what the transferor believed to be accurate, and the Society has not even now proved that the proposed transferee was not a wine merchant.

Napier Higgins, Q.C., and *Montague Cookson*, for the Official Liquidators of the European Society were not called on.

Lord WESTBURY—

I must have it understood that in matters of this kind I will not have a veil thrown before my eyes by any description of technical argument. When I have ascertained the facts, I will decide according to the truth and justice of those facts. In the present case the old observation applies, *Res ipsa loquitur*. A gentleman is the owner in the month of July, 1870, of 630 shares in this unfortunate company, representing the liability of at least 630*l*. He tells me frankly and honestly, like a man of integrity, that he believed the company to be insolvent; he tells me also that he then set about meditating a mode of releasing himself from liability. Now I do not impute that to him as a crime; he had a perfect right to endeavour to get rid of his liability. I am not going to denominate that as a culpable motive. He had a motive, and a right to release himself fairly and honestly from his liability, if he could find the means of doing so. He tells me frankly what he did; he went to his solicitors, he stated his position, and I am inferring from his words that some such conversation as this took place. "What am I to do in order to escape from the peril of my situation?" His solicitors seem to have been ingenious men, and they told him in return, "We will find a man to take a transfer of your shares; of course he will be a man not worth a shilling, for no man would place himself in a situation of liability without the prospect of anything to recompense him for putting himself in that situation; you will accordingly have to give him money to put himself in your shoes: it is a very questionable transaction, it may not be successful; therefore it will be prudent to promise him the money only when the ingenious device is successful." There Mr. Lloyd seems to have left the matter: he trusted to his solicitors. They cast about, and they found a man whom they represented to be a wine merchant. Mr. Lloyd was told he was a wine merchant, and he tells us distinctly that he knew no more than he was told. The origin therefore of this story of the trading as a wine merchant is brought home to Mr. Lloyd's solicitors, and what those gentlemen knew must be imputed to him. Now is it possible for anyone not to perceive in this transaction that they went into the market and bought a man to stand in the situation of transferee? I have offered the counsel of the applicant that if he desires to bring before me the solicitors at any time to-morrow for the purpose of swearing that they knew Mr. Jackson to be a wine merchant, that they believed him to be a wine merchant, that they were told and believed and had ascertained that he filled that position, and with that *bonâ fide* belief told Mr. Lloyd so, and prepared the transfer, they shall have the opportunity of coming so to swear. [*Hemming.*—May I ask your Lordship that, until they have that opportunity, the inference your Lordship has drawn from the imperfect evidence before you may not be considered as conclusive?] I shall not draw any inference. I have taken Mr. Lloyd's own statement. He tells me himself that he knew nothing of this Mr. Jackson: he tells me himself that he knew no more than his solicitors told him, and he says distinctly, I believed him to be a wine merchant, because I was told so. He has not brought forward any other individual as the author of this statement except his solicitors. Now I have offered it because I was requested to give an opportunity, but I do not think it at all essential for the determination of the case. But I am obliged in the outset—particularly having regard to the manner in which this case has been argued, as if there was not upon it one single spot of dishonesty—I am obliged to mark that as being very different from my sense of the case: and I state in the outset that the case originated in an attempt to practise a deception on this company, and that deception was carried into effect by representing, not the real transaction, but a very different transaction, by representing the intended transferee as filling a character perfectly different from that which he in reality filled. Now, why these things are so important is apparent to all who will pay the least attention to the reason why legislation was introduced on this subject. We know that when the power of transferring their shares was given to shareholders, it was felt unquestionably that it was a power that must be limited by some conditions. It could be carried into effect only by an application to the directors, and, therefore, it became requisite to secure some kind of caution and protection to the other shareholders against one of their partners attemping to get rid of his joint liability with them in an unfair and improper manner. This

was attempted to be done sometimes by a clause such as we find in the deed of settlement, sometimes by a clause differing somewhat from it, such as Mr. Hemming pointed out in that case that he mentioned (*Chappell's case*, L. Rep. 6 Ch. 902; 25 L. T. Rep. N. S. 438), in which he cited the opinion of Lord Justice Mellish. The clauses vary, and they vary in some respects which are material. The clause in that case varies from the clause in this, just in a manner which might have warranted the observations of Lord Justice Mellish, but would not make those observations at all applicable to the present clause, which is differently worded. Now I beg that particular attention may be given to the construction that I put on this clause. You will observe in the outset that the power of transfer here is a power given to the shareholders after certain things have been done. Of course it is necessary that those things should be done *bonâ fide*, because what precedes the arising of the power is a representation made to the whole body of the partnership through the medium of their agents, the directors to warrant the conclusion that it is a proper case in which the power of transfer ought to be exercised. Now what is done according to this form of clause is this: the shareholder who wishes to transfer shall be under an obligation to give to the company in the first place a notice in writing containing the full name, and profession or calling, and place of abode of the proposed shareholder. I do not mean to dwell in the smallest degree upon the technical objections that have been raised, that the notice here given by Mr. Lloyd was not exactly in the form of words required by the company. There is no power in the company to limit any particular form of notice or to prescribe it, and therefore a notice, however given, if it complies with the substantial requisitions of the clause, would satisfy my mind. Well then, it goes on, after he has given that notice, two alternatives shall arise: first of all, if the person or persons shall be approved of as hereinafter mentioned—that is one alternative—if that takes place, the shareholder's power to transfer his shares immediately arises. Then there is another alternative, and it is quite clear that this other alternative was put in for the purpose of protecting the directors. The person who drew the clause, naturally felt that in many cases the directors might not be able either to approve or to disapprove in terms, or they might have a case in which they would feel it probably a very difficult matter to disapprove. If they disapproved and stated their doubt of the solvency of the proposed transferee they might in so doing incur very considerable legal liability. In all doubtful cases, therefore, this option was given to the directors, that instead of either approving or disapproving, they might avoid the obligation and the risk of so doing, and propose to the shareholder a nominee of their own; and accordingly the alternative runs thus, "or" that is, if he is not disapproved of, or if he be not approved of, then the directors may take this course. This alternative was intended to answer another purpose also, namely, that the shareholder, wishing to transfer, might, but for this clause, be kept for a considerable period in doubt and uncertainty whether the directors would approve or disapprove. And accordingly the clause answers two purposes: one is that it is a clause of protection to the directors from revealing what were the motives that influenced their approval or disapproval, and the other that it gives to the shareholder the right of limiting the period of their deliberation, and of drawing a conclusive inference if he receives no communication from the directors within fourteen days. Of course, if he receives a communication of approval, the clause becomes unnecessary; equally so if he receives a communication of disapproval; but if he hears nothing, then he is warranted in arriving at the conclusion that the person or persons proposed should be considered as approved of by them; and then follow the words which are most material; after stating these alternatives as to the course that might be pursued by the directors, the clause runs—"Then and in such case," that is, in case of approval of the proposed transferee, or in case of the directors keeping silence, in which case his proposal is to be considered as accepted, "Then and in such case the shareholder may transfer the same share or shares." The power to transfer arises only on one of the antecedent alternatives taking place. If the nominee be approved of the power arises. If instead of the nominee another person is proposed by the directors, the power arises. If the directors neither approve nor propose another nominee, keeping silence, then their silence is to be construed as an acceptance of the proposal of the shareholder, and then the power arises. In the present case what have we got? I will take the application to have been made in a formal manner on the 23rd of July, and I entirely put aside the technical objections that have been made to there not having been a special form of notice, and to the fact of the transfer having been made before the answer of the directors—which was not in conformity with the deed, and which made the transfer go for nothing. The application is made on the 23rd July, and much within fourteen days from that time the applicant, Mr. Lloyd, is not left in doubt. He is not warranted in supposing that the directors have a nominee of their own, neither is he warranted in supposing that the directors mean to acquiesce in his proposal, but he is told distinctly that his nominee is not approved of or accepted. Now I want to know how did he get the power of transferring? How could that transfer have been made after that communication? He could make no transfer whatever, nor could anybody else make a transfer. But then if he desires me to examine the grounds of the disapproval—although I do not know that any court has the power of controlling this discretion of the directors in this matter, and I do not know that in any case, short of fraud or combination by the directors against the shareholders, that I could examine their grounds—but if I do examine their grounds, I find very sound and good grounds of objection taken. I find them so stated, that if they could have been removed, Mr. Lloyd might have removed them; I say it would have been an utter departure from their duty if these directors, with their knowledge at the time, had approved of Mr. Lloyd's proposed assignee, namely, Mr. Jackson. It certainly was not within the power of Mr. Lloyd to say, "You ought to have accepted my nominee, and, therefore, I have a right to treat you as having made the transfer which you ought to have made." I desire therefore to put the case upon these two

grounds, first, that Mr. Lloyd's proposal having been disapproved of, the power of Mr. Lloyd to transfer never arose; secondly, I say that Mr. Lloyd's nominee having been disapproved of, that disapproval is shown to my mind to be warranted by every sense and feeling of the duty that they owed to the shareholders. I also say that the proposal by Mr. Lloyd of a man of this stamp was a proposal at variance with the obligation which it was intended that a shareholder making such a proposal should make it under a sense of, namely, that he should propose a person, who, as between himself and his brother shareholders might be fairly and reasonably accepted as a substitute for himself, and stand in his shoes with equal power to perform the obligations of a shareholder to the company. Now, observe, I do not mean to be inconsistent with anything that I have said. I said on a former occasion, that if a man meditating this is fortunate enough to complete the transfer before it can be discovered and impeached, then I can do nothing; he has the benefit of a concluded matter. But that is not the case here. Mr. Lloyd comes here to have an incomplete transaction completed. Mr. Lloyd's merits in point of equity are none: his merits in point of law are, if possible, less; and if it is put on the ground that he had done everything which it was incumbent on him to do in law and equity, and that the directors by their refusal violated the principles of equity and justice, then Mr. Lloyd would be entitled to succeed on every ground. But there is no such proposition that he can maintain in any part; and therefore I am bound to refuse, and in a case of this kind I do refuse with very much satisfaction, this attempt to inflict a fraud on the company. In the early part of these proceedings I stated that I thought that it was a very good arrangement and one that would perhaps conduce much to the ultimate saving of money to the company, if I lay down the rule that, however I may decide, if a case was brought forward by agreement between the parties in order that it might govern many other cases, then, even if the case failed, I should think it right that the applicant should have the costs. But there must be some limit to that; and if a case is brought forward which is destitute of everything to recommend it in point of honesty and truth, I cannot allow that rule to be applied. Therefore in this case I refuse the application. I direct Mr. Lloyd to pay the expenses of it. I dismiss his bill in equity, and direct him to pay the costs. I cannot leave the case without observing that I think there is nothing at all casting any reflection on Mr. Lloyd. He believed that he was acting in conformity with the law, and he believed, what a great many other persons believe, that what the law permits must be right. He has come here with a very truthful account of the whole transaction. I think he has stated it with great fidelity, and it is the only thing that makes me regret that on general principles I am obliged to make him pay the costs of the proceedings before me. The action must be discontinued on payment by Mr. Lloyd of the calls which I shall now direct him to pay; but I shall not make him pay the costs of the action. I shall make no order as to the costs of the action. The society rushed into a court of law and shall not profit by it: Mr. Lloyd rushed into the Court of Chancery and should pay for it. Now, let it be understood that, however many cases may be settled by agreement on matters of this kind, if they have about them the features of an attempt to defraud the company that exist in this case, no agreement that may be made about costs will have any influence on my mind.

Mercer.—There was no agreement here.

Solicitors for Mr. Lloyd, *Ward, Mills,* and *Co.*

Solicitors for the Official Liquidators of the European Society, *Mercer* and *Mercer.*

Thursday, Oct. 31.

MINSHALL'S CASE.

Company—Winding-up—Contributory.

On an application to remove a name from a list of contributories, the person to whom an incomplete transfer has been made must be before the court.

A shareholder sold some shares in a company to A., but in consequence of some informality in the notice of the wish to transfer the directors did not send the form of transfer, which was required by the company's deed of settlement. The transfer never having been completed, the shareholder some time after sold the shares together with others to B., and gave notice of his wish to transfer, but for some reason the directors on this occasion also refused to forward the requisite form of transfer, and no transfer was ever executed. On the winding-up of the company, the shareholder contended that he ought not to be on the list of contributories in respect of these shares, inasmuch as, but for the neglect of the company, he would no longer have been on the register in respect of them.

A. and B. were, however, not before the court, and it was

Held, that, on an application to remove A.'s name from the list of contributories in respect of these shares, both A. and B. must be present in order to be bound by an order which might be to their prejudice.

THIS was a question as to whether Mr. Robert Jones Minshall's name, was to be on the list of contributories to the European Assurance Society in respect of 910 shares, or in respect of 10 shares only.

In 1869 he held 1440 shares in the society, and in May 1869 he sold 700 shares to Mr. William Minshall. Notice of the wish to transfer was forwarded, together with the certificates, to the society on the 20th May 1869 through Mr. Stones, the society's agent at Stockport. The notice was not in the usual form required by the directors, and did not state the calling or the place of abode of the proposed transferee, as was required by the 96th clause of the society's deed of settlement: (*Vide Read's case, sup.* p. 11.)

On the 8th July 1869 the general manager of the society wrote to the agent as follows:

Dear Sir,—I am sorry your letter in Minshall's transfer has not been replied to, but really the great influx of business has caused the delay, as well as that of sending the transfer in favour of Salmon. The name in this case having been passed, the purchaser Salmon will have to pay the amount of call, but until that is paid, I am sorry to say a transfer cannot be issued. The transfer books are now closed, and will be again opened on the 15th. Any notices for the Board should be on or before that date. I retain the certificates, awaiting your instructions.—Yours faithfully,

HENRY LAKE, General Manager.

W. W. Stones, Esq.

The transfer was never duly completed and registered, in consequence of the neglect to pay a call of 5*s.* per share, which was made on the 24th July 1869. Transfers of others of his shares were subsequently completed and registered, and thus his shares were reduced to 910, including the 700 which he had wished to transfer to Mr. Wm. Minshall. In the midst of his intricate transactions in shares he still pressed for the completion of his transfer of the 700 shares to Mr. William Minshall. The transfer was, however, never completed; and on the 8th Sept. 1869 he gave an informal notice to the society of his wish to transfer 900 shares to Mr. Fildes, and requested a form of transfer to be sent to him. This notice did not state the calling or the place of abode of the proposed transferee, as was required by the 96th clause of the society's deed of settlement. On the 10th Dec. 1869 the general manager of the society wrote as follows:

Dear Sir,—I am requested to inquire of you if it is still your wish to make out the transfer of your shares, and if so, I will place the matter before the next transfer committee on hearing from you.—Yours faithfully,
HENRY LAKE, General Manager.
Mr. Robert Jones Minshall.

And again on the same day.

Dear Sir,—If you want to make a transfer of your shares, you must send up the usual notice, and it shall be submitted to the next meeting of the transfer committee and you shall be communicated with.—Yours faithfully, HENRY LAKE, General Manager.

It did not appear that any reply was sent to these letters. In Sept. 1870, Robert Jones Minshall wrote that he expected his shares would have been transferred, and again on the 13th June 1871, he wrote to the manager of the society a letter, in which he said: "I only want you to transfer me the 900 shares, or take the 700, as I think it is only right, as it was through this delay of the company or I should have had them sold at 5*s.* 6*d.* per share and handed the moneys in my hands."

No transfer was ever executed in respect of the 900 shares.

The order to wind-up the European Society was made on the 12th Jan. 1872, on a petition presented on the 10th June 1871.

Hemming appeared for the applicant, and contended that, if the directors had not in the letter of the 8th July 1869 expressed their approval of Mr. William Minshall as a proposed transferee, at any rate they had neglected for a fortnight to express their approval or disapproval, and thus under the 96th clause of the deed of settlement, Robert Jones Minshall was entitled to transfer his shares to William Minshall, and the transfer would have been completed but for the neglect of the directors in not forwarding a form of transfer. Thus, if it should be held that the second transaction fell through, he can fall back on the first. The second transaction was, however, a *bonâ fide* sale of 900 shares to Mr. Fildes, and the transfer would also in this case have been effectually completed but for the neglect of the directors. The applicant is entitled to have that considered as done which would have been done but for this neglect. In that case he would be the holder of ten shares only.

Lord WESTBURY.—Is William Minshall before me? I cannot strike Robert Jones Minshall off by virtue of the contract, unless he gives me the means of putting the other person on in his place.

Hemming contended that the transferor was not to be deprived of his right to relief, merely because the transferee was not present to be put in his place.

Lord WESTBURY.—By taking a name off and putting no other person on, I do damage to the shareholders, who ought not to suffer for delinquent directors.

Montague Cookson appeared for the official liquidators of the European Society, but was not called on.

Lord WESTBURY.—This application is in effect for the specific performance of an alleged contract to transfer these shares to Mr. Fildes. I must have Mr. Fildes brought here, in order that my order may bind him to accept the shares, as well as that it may declare the right to transfer. But inasmuch as on the applicant's own showing Mr. Fildes has got the 700 shares that were the consummated property of Mr. William Minshall, I must have Mr. William Minshall here also, in order that I may bind him by an order declaring the 900 shares to be the property of Mr. Fildes, to the prejudice of the former, who, according to the applicant's showing, was entitled to 700 of these shares. Now if the applicant wishes to do that, he shall have time. I think it will take a considerable time.

Hemming.—I should like to ascertain what can be done. If we can get them here, the matter may be put in the paper again.

Lord WESTBURY.—I had better not fix any day, but give you leave to apply to restore the case to the paper whenever you feel that you have the power of removing that objection.

Solicitor for the applicant, *Reddish.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Friday, Nov. 1.

Principles of Novation.

After the argument in *Blundell's case* (*vide infra*), had been heard, and before the commencement of *Coghlan's case* (*vide infra*),

Lord WESTBURY said:—I think it would be desirable that I should mention to the Bar and to the suitors some conclusions at which I have arrived upon matters of this kind, and which I mention now not as indicating the rule that I shall henceforth follow without further discussion, but as intimating what my impressions are, which the Bar will be quite at liberty to deal with, to show that they are mistaken or that they are injudicious and inexpedient. Now looking at the nature of the decisions that have taken place upon this subject of what is called novation, it is at present my impression that it will be desirable to have these cases decided with reference to the following rules:—

First, wherever there is an alleged case of novation, it is my impression at present that I must require of the company, which I will call the transferee company, proof that that company had legal powers to grant new policies to the policy holders of the transferor company upon the same terms as are contained in their policies or to take the policies of the transferor company and adopt

them, and indorse them with the acceptance of the transferee company, so as to make them analogous to original policies granted by the transferee company.

Secondly, I shall require it to be proved before me that this power of the new company, that is of the transferee company, was made known to the policy holder, and that an offer was made to him to accept either a new policy or an endorsed policy of the transferee company.

Thirdly, that the acceptance of such an offer or proposal by the policy holder shall be proved by acts which unequivocally denote his understanding and acceptance of that proposal. Now I use the word "unequivocal" for this reason, that I have to consider and decide matters of this description with a species of guide given to me by the seventh clause of the Life Assurance Companies Act, 1872. It may be very true that I could not hold myself at liberty to adopt that enactment and apply it to the cases to be decided by me; but I derive this light from the enactment, that the Legislature were satisfied that in many of these cases equivocal circumstances had been accepted, unfortunately, perhaps unjustly, as evidence of assent on the part of the policy holder, and that having regard to that, they deemed it right to require more unequivocal proof of the acceptance of the policy holder. Now, by that I may be guided so far as to require acts on the part of the policy holder which shall prove to everyone's reasonable satisfaction that he did intend to accept, and did accept, the security of the substituted company. These rules are, as I conceive, quite in accordance with the principles of law fully established long anterior to arbitrations of this character. I propose, subject to your argument, to guide myself by those rules; and, if I find no reason to alter them or lay them aside in consequence of what may be urged against them—and you will deal with them with perfect freedom—then, if those rules are established as the principles that will guide my decisions, they will prevent very much uncertainty, and possibly will prevent a great deal of costly and unnecessary litigation. The policy holders must understand that if those rules are once established, they will come here with any cases that may be at variance with them at their peril. Now I hope that this will serve to guide us in a certain degree in our path over the desert that we have to travel, and which we shall have to travel with very great pain, because it is impossible to see that this proceeding will be productive of much benefit to anybody. This arbitration is an anomaly; it is only to be justified by its necessity, and its necessity is a great reproach to the judicial institutions of the country.

Friday, Nov. 1.

COGHLAN'S CASE.

Life assurance company—Amalgamation of companies — Winding-up — Policy — Novation of contract — Payment of premiums — Receipts — Bonus circular — Protests — Policy holder held, after an amalgamation, to be a creditor not of the new company, but of the old.—Provision in deed of settlement of the old company with respect to an amalgamation, not such as to bind the policy holder without his assent.—The company having no office, leave given to serve certain shareholders with notice of intended application for winding-up order.

A. held a policy granted by the C. Life Assurance Company in 1848 *on his own life. In* 1857 *he received a circular from the P. Company, dated the* 1*st June, and addressed to the shareholders and policyholders of the P. Company, and announcing that the arrangement was completed, by which the C. Company transferred their business to the P. Company; there was further a request that those addressed should exert their best powers to help in carrying out the sanguine expectation of the directors of the P. Company.*

This was the only notice received by A. with respect to the amalgamation, and to this circular he sent no reply. On the 12*th June he received a letter from F., a director of the C. Company, requesting him to forward his policy to be exchanged for a P. Company's policy. A. wrote in reply refusing to exchange his policy. Shortly after he wrote to M. and F., the two directors of the C. Company that had signed his policy, and requested to know what was to be done with reference to his policy, and to whom he was to pay the premiums on his C. Company's policy. Thereupon a correspondence ensued in which he was referred to the P. Company. However, for the premiums that were paid by A. in* 1858 *and* 1859, *he received the old C. Company's forms of receipts signed by M. and F., the two before-mentioned directors of the C. Company. Before the payment of the premium in* 1859 *he again wrote to M. and F., saying he had nothing to do with the P. Company. In* 1860 *the P. Company transferred its business to the B. N. Company, and A. received from the P. Company a circular informing him of the amalgamation, and further stating that the conditions of the P. Company's policies would remain unaltered by the transfer, and that the policyholders were fully guaranteed by the B. N. Company, but that they could have their policies indorsed: and that all premiums were in future to be paid to the B. N. Company; he at the same time also received a circular from the B. N. Company, informing him, inter alia, that that company had taken upon itself the payment of his policy. Thereupon A. went to the B. N. Company's office and protested to the manager against being transferred to that company, and on the manager's requesting him to have his policy indorsed he refused to do so, and said he had a C. Company's policy, and would not give it up. On the first payment of his premium to the B. N. Company, he requested to have a C. Company's receipt, but he was told that he could be furnished with no other receipt but that of the B. N. Company; thereupon, after protesting against the transfer, he accepted a B. N. Company's receipt. The subsequent premiums were paid to the B. N. Company, and receipts accepted from them without further protest. In* 1865 *the B. N. Company transferred its business to the E. Company, and the first premium was paid to the E. Company under protest. Subsequently, the premiums were paid to the E. Company, and receipts accepted from them without protest.*

In 1863 *and* 1867 *bonuses were declared by the B. N. and E. Companies respectively, and on each occasion a circular was sent to A., announcing that he was entitled to a reversionary bonus, but he never took any notice of either circular.*

In 1872 *A. claimed that he had never entered into a*

new contract with either of the P., B. N., or E. companies, and that he would be entitled to claim on his policy against the C. Company; but the official liquidators of the E. Company contended that by the terms of the C. Company's deed of settlement the liabilities of the C. Company on their policies could be wholly annihilated by a transfer to another company, without any assent being required on the part of the policy holders, and that even if this were not so, there had been a novation of contract by the policy holder with the E. Company.

Held, that the provision in the C. Company's deed of settlement for a transfer of liability was not such as to bind the policy holder without his assent, and that there had been no novation of contract.

In order to create a novation, there must be on the part of the new company a power to make the new contract, and there must be on the part of the policy holder a knowledge of the company's right so to contract with him, and where there is an incomplete contract, or where there is no evidence in writing of any intention to contract, there must be conduct on the part of the policy holder that unmistakeably shows that he intended to accept the new company, and to discharge the old.

The onus is not on the policy holder to prove that he did not intend to enter into a new contract, but is on the company, alleging a novation, to prove that there was a novation.

A. further applied to have the C. Company wound-up, but it was

Held that no winding-up order could be made in the absence of the company; and the C. Company having no office, leave was given to the applicant to serve an affidavit, to be made by him, on certain gentlemen who, at the time of the transfer of the business of the P. Company, were shareholders of the C. Company, and also to tell them that an application was going to be made for a winding-up order, and such service was to be considered as service on the C. Company.

THIS was a claim by Mr. Coghlan to rank as a creditor of the Catholic Law and General Life Assurance Company, and as such creditor to have the company wound-up.

In 1848 the company granted him a policy assuring the sum of 200*l.* on his own life. He duly paid the premiums to the company down to the year 1857. In June of that year he received the following circular:

Confidential Circular.

Phœnix Life Assurance Company,
1st June 1857.

To the Shareholders and Policy holders of the Phœnix Life Assurance Company.

Gentlemen,—We have the honour to inform you that we have this day completed the arrangement by which the Catholic Law and General Life Assurance Company pass over their entire business to us, and we sincerely hope that you will approve of this measure, which is likely to bring us not only a considerable business, but a proprietary second in influence to none, and that, stimulated by this increased aid and extended field of action, you will kindly exert your best powers to help us in carrying out our now sanguine anticipations.

Your obedient servants,

R. H. GOOLDEN, M.D., Chairman.
HENRY R. ADDISON, Managing Director.

To this circular Mr. Coghlan sent no reply. Shortly after, he received the following letter from Mr. Forristall, one of the directors of the Catholic Company:

Catholic Law and General Life Assurance Company,
London, 12th June, 1857.

Dear Sir,—Will you kindly let me have your policy by return of post, and it shall instantly be exchanged for one of equal amount, and having precisely the same advantages, dates of payment, &c., in the Phœnix Life Assurance Company.—Yours truly,

M. FORRISTALL.

To this letter Mr. Coghlan sent the following reply, refusing to have his Catholic exchanged for a Phœnix policy:

June 19th, 1857.

Dear Sir,—I beg to acknowledge the receipt of your letter of the 12th inst., and regret to say that circumstances have come to my knowledge which render it quite impossible that I can comply with your request. However, as I wish to avoid litigation, I am prepared—although I have not yet ascertained the acceptability of my life by any other office—to surrender my policy when the whole of the premiums I have paid have been returned to me.—Yours, &c., THOS. COGHLAN.

To this letter no reply was sent. Subsequently Mr. Coghlan wrote, with reference to his Catholic policy, to Bishop Morris, one of the directors of the Catholic company that had signed his policy. This letter and the reply could not be found. On the 28th Dec. 1857, he again wrote to Bishop Morris:

Right Reverend Sir,—I thank you sincerely for your note just received, but fear that in my anxiety to explain how I came to trouble you I did not make sufficiently plain to you the object of my note, which was to learn from you, as one of the directors of the Catholic Law and General Life Assurance Company, what is to be done in the matter of my policy. More than six months ago I wrote to your colleague, Mr. Forristall, on the same subject, and Mr. Forristall has taken no notice of my letter. Permit me, then, to ask are you prepared, on the part of the company, to give me a receipt as hitherto, or to return me the premiums already paid? I fear that the chance of an answer from Mr. F. depended on the chance of your seeing him, and drawing, as you have kindly promised, his attention to this matter, will scarcely do, as the next premium should be paid before the 13th of next month. Requesting, therefore, the favour of an early answer,—I am, &c. THOS. COGHLAN.

On the 1st Jan. 1858, Bishop Morris wrote in reply:

Dear Sir—Glad as I should be to satisfy any person applying to me for information, I much fear it is not in my power to answer your two questions in the way you might desire. To the first, I am not prepared to give any receipt, as I have no longer any official status or position in any company. However, I am quite satisfied that for any payments you may pay there will be given a receipt satisfactory in every way.

To the second, as I have no official status in the company, I can give no answer.—Believe me to be truly yours, W. MORRIS.

On the 4th Jan. 1858, Mr. Coghlan again wrote to the Bishop:

Right Reverend Sir,—I am much grieved to have still to trouble you about my policy. To whom, however, can I address myself on this subject but to you or Mr. Forristall? You alone as directors of the company have signed the policy, and all subsequent receipts. I know no one else as representing the company; the office in Coventry-street has been abandoned; Mr. F. does not answer my letter, nor has he now any residence that I can discover. You alone have had the courtesy to favour me with a reply, for which I tender you my sincere thanks. But in your last, after saying you cannot give me a receipt for any more premiums, nor return me those already paid, you say that you are quite satisfied that for any premiums I may pay there will be given me a receipt satisfactory in every way. Now (you will pardon me for saying it) this is very vague—I might use a stronger term.

Who is to give me a receipt satisfactory in every way? I really ought to know by this time, as it is six months since I wrote to Mr. Forristall on the subject, and the

next premium should be tendered on the 12th inst., as I informed you in my last.—Yours, &c.,

THOS. COGHLAN.

On the 6th Jan. Bishop Morris wrote in reply:

Sir,—I am sorry that my endeavours to prove satisfactory have not that result. The more so when you tell me that they are vague—you might even, you add, use a stronger term. Perhaps Mr. Forristall may be more succeseful than I have been. A letter will find him at 4, Northumberland-street, Strand.

Believe me to he yours, &c.,

WILLIAM MORRIS.

On the 7th Jan. Mr. Coghlan wrote to Mr. Forristall, but this letter could not be produced. The following was the reply, dated the 8th Jan. 1858:

Dear Sir,—I have received your letter of yesterday's date, respecting your life policy of assurance granted by the Catholic, Law, and General Life Assurance Company, and in answer I beg to state that the above company has amalgamated with the Phœnix Life Assurance Company, and that you may have a new policy in the latter company on the same conditions contained in the policy you now hold, but should you be disinclined to exchange your policy for one in the new company, you can receive a receipt, as heretofore, signed by two directors, who are directors of the Catholic Company and are still the directors, until the Catholic Company is dissolved, on your paying the premium when due at the office 1, Leadenhall-street, London.

Believe me to be, my dear sir, yonrs truly,

M. FORRISTALL.

It did not appear what was done with reference to the premiums, which became due in Jan. 1858; however, no receipt was accepted from the Phœnix Company. In Dec. 1858, he received from the Phœnix Company a renewal notice informing him that the premium on his policy would fall due on the 13th Jan. 1859, and on the 3rd Jan. 1859, he wrote to Mr. Forristall as follows:

Sir,—I mnst again trouble yon, for the Catholic Life Assurance Company has not been wound-up (as you last year stated it wonld be), to inform me to whom I am to pay the premiums that will be due on my policy on the 12th inst., for the company does not appear to have had a public office for the last fifteen months.

Perhaps you will also kindly inform me where and to whom, in the event of my death, my representatives are to apply for the sum for which my life is insured in the above company.—An early anewer will oblige your obedient servant,

THOMAS COGHLAN.

On the 4th Jan. 1859, Mr. Forristall wrote in reply:

Sir,—In answer to your letter of yesterday's date, I beg to inform you that you must pay the premiums on your policy at the Phœnix Life Assurance Company, 1, Leadenhall-street, London, and, in the event of your death, your representatives must apply to that company, and they will receive most certainly, and as a matter of course, the amount of your policy.—Believe me to he, yours truly,

M. FORRISTALL.

On the 5th Jan. 1859, Mr. Coghlan again wrote to Mr. Forristall:

Sir,—I have just received your letter of the 4th instant, and must say that, after what has passed between us on this subject, you appear to be trifling with me.

I have nothing to do with the Phœnix Company, and after having read, as you must have done, the petition of Mr. Barlee to the Court of Chancery, I am surprised at your referring me to that company.

Again, then, I must beg of you, as one of the directors, to inform me where I am to find the Catholic Law, &c., Company, as that company is still liable to me for the premiums I have already paid, and to that company only can I pay the premium that will be due on the 12th inst.

I am, &c., &c.,

THOS. COGHLAN.

On the 8th Jan. 1859, Mr. Bourne, the accountant of the Phœnix Company wrote as follows:

Sir,—Your letter to Mr. Forristall has been duly received by him, and I am desired to inform you that you can pay your premiums at this office, and receive a Catholic receipt, signed by two Directors of the Catholic Company.

You are doubtless aware that Mr. Barlee was very glad to withdraw his petition to the Court of Chancery.

Your obedient servant,

E. H. BOURNE,
Accountant.

On the 12th Jan. Mr. Coghlan again wrote to Mr. Forristall:

Sir,—I beg to acknowledgo the receipt of a letter from Mr. Bourne, in reply to mine of the 5th inst.

Referring to your letter of the 8th Jan. 1858, I find you speak of the Catholic Company as being about to he dissolved. Will you kindly tell me when that event is likely to happen?

You will not, I trust, consider this question as out of place, when you reflect that I am asked to pay a premium to the Company, although it has had no public office since 1857, and has not made its annual return to the registrar of Joint-stock Companies, in conformity with the Act 7 & 8 Vict. since the year 1855 or 1856, I forget which.

Trusting you will favour me with an answer,

I am, &c.,

THOS. COGHLAN.

On the 15th Jan. 1859 Mr. Evans, the secretary of the Phœnix Company, wrote as follows:

Sir,—Mr. Forristall has handed me your letter to reply to. The business of the late Catholic Law Life Assurance Company having merged into this company, you can send your premiums here, and you will receive a receipt signed by two of their directors. Unless the premium is paid before the expiration of the days of grace, viz., the 12th Feb., your policy will lapse. All the business of the Catholic Law Life Assurance Company is carried on at the office.—Your obedient servant,

MAURICE EVANS.

On the 10th Feb. 1859, Mr. Coghlan paid the premium due on his policy, and received a receipt signed by Bishop Morris and Mr. Forristall, in the following form:

Catholic Law and General Life Assurance Society.
Receipt No. 203. £5 15s. 4d.
Policy No. 138.

Received this 10th Feb. 1859, of Thomas Coghlan, Esq., the sum of £5 15s. 4d., being the premium for 12 months, ending the 12th Jan. 1859, for the assurance of the sum of £200 upon the life of himself, agreeably with the terms of a policy of assurance granted the 13th Jan. 1848, numbered as above.

WILLIAM MORRIS } Directors of the
M. S. FORRISTALL } said company.

Nothing further was done for nearly a year. On the 12th Jan. 1860, Mr. Coghlan wrote to Bishop Morris:

Right Reverend Sir,—On the 12th Jan. 1859, I wrote to Mr. Forristall of the directors of the Catholic Law and General Life Aesurance Company, reminding him that on the 8th Jan. 1858, he spoke of the above company as being about to be dissolved, and asked him to have the kindness to inform me when it was likely that that event would take place, also why the company have not made its annual return to the registrar of joint-stock companies, in conformity with the 7th and 8th Vict. since the year 1856. Mr. Forristall did not answer my note. I received, however, a communication from a Mr. Evans, acknowledging the receipt, and informing me that the business of the Catholic Law and General Company is transacted at 1, Leadenhall-street, and that if the premiums be not paid before a certain date, the policy will become void.

I now on the 12th Jan. 1860, just twelve months later, venture most respectfully to put the same questions to you as the other director of the company, who has signed my policy, and subsequentiy all the receipts.

When does the company intend to dissolve?

Why has the company omitted to make the annual

return to the registrar as required by the statute under which it is incorporated? and I beg to add another question,—why does the company continue to demand from me a premium in accordance with the profit scale when, having disposed of its business, it can by no possibility, that I can discover, have any profits to divide.

Trusting that you at least will not consider these questions as inopportune.—I beg to remain, &c.,

Thomas Coghlan.

On the 27th Jan. 1860, the Bishop sent the following reply:

Sir,—I have received your letter, in which you wish to make some inquiries of me on the subject of your life policy. In reply I am sorry to say that I cannot do more than refer you for information thereon to the office where you tell me you pay the premiums, 1, Leadenhall-street. —I remain Sir, Yours, &c., Wm. Morris.

On the 11th Feb. 1860, Mr. Coghlan paid his premium and received a Catholic receipt just as in the previous year.

In 1860 the Phœnix Company transferred its business to the British Nation Association. On this occasion Mr. Coghlan received the following circular:

Phœnix Life Assurance Company,
March 22, 1860.

Dear Sir,—I believe you are aware from the statement on the renewal receipts that the life and endowment policies of this company have been since the 30th June last guaranteed by the British Nation Life Assurance Association. The directors of this company have now come to the conclusion to transfer the life business absolutely to the British Nation.

The transfer takes effect from midnight of the 29th Feb. last.

The existing annual income of the British Nation exceeds £30,000, and the capital amounts to more than £100,000, subscribed by upwards of 300 shareholders. Its new business is also very greatly increasing, and the probability of large bonus advantages is therefore also great.

The terms and conditions contained in the policies issued by this company will remain in any case unaltered by this transfer. The policyholders are fully guaranteed for all claims by the British Nation under the deed between the two companies, but any of the assured desiring it can have the endorsement to that effect made on their policies.

All communications should be henceforth addressed, and all premiums paid, to Henry Lake, Esq., manager and secretary of the British Nation Life Assurance Association, 291, Regent-street, London.

The directors feel that in the steps they have taken they have consulted the best interests of their policyholders, and have secured for them the most permanent advantages in their power.—I am, yours faithfully,

Edmond Beales,
Chairman of the Phœnix Life Assurance Company.

British Nation Life Assurance Association.
London, March 22nd, 1860.

Dear Sir,—By the accompanying letter of the chairman of the Phœnix Life Assurance Company, you are informed that the arrangement concluded some time since for the guarantee of the life and endowment policies of that company by this association has been extended to an absolute transfer.

As the life and endowment policies of the Phœnix Life Assurance Company have, since midnight of the 30th June last, been guaranteed by this association, the premium, renewal receipts, and the policies issued since that time, bearing that assurance on the face of them, no change whatever is required in the policies, all the terms and conditions contained in them being adopted by this association. Under the deed of transfer made between the British Nation and the Phœnix Life Assurance Company, it is not necessary for us to trouble policy holders to send their life and endowment policies for indorsement by this association. Should, however, any policy holder wish it, if he will forward his policy, either direct or through the agent in his district, it shall be immediately (after the succeeding Thursday) returned to him, indorsed, signed by three directors, and sealed with the seal of this association, or if it be inconvenient to him to forward his policy, on hearing that he desires it, a special guarantee policy will be issued to him without expense. But it is necessary for me to inform you that all policy holders are perfectly secure under the renewal receipts, and the terms and conditions contained in the life and endowment policies issued by the Phœnix Life Company remain unaltered by the transfer.

The agents of the Phœnix Life Office will now become agents of the British Nation.

The business of this association has been for some time increasing, and the average of the last three months has been twenty-five policies weekly. The principles which render it thus popular, and the position and prospects of this association, are set forth in the accompanying prospectus and in the extracts from press notices herewith enclosed.

I am not desirous of making any observations respecting the Phœnix Life Assurance Company, but, as you may have observed that it has been engaged in litigation, I consider it necessary to remark that your policy will be totally unaffected by that litigation. The British Nation takes upon itself the payment of your policy, and has nothing whatever to do with the other liabilities of the Phœnix.

Your position as a policy holder, I need scarcely remark, will be greatly improved by the arrangements now made. By the union of interests, and by the conduct of joint businesses in one office, and by one official staff, a very considerable reduction of expenditure is effected, which must add considerably to the bonus, while the rate of new business, large as it is at the present time, will be greatly accelerated by the concentration of interests and income.

Allow me, therefore, to express the hope that you will, as a policy holder, do all in your power to uphold and increase the business. You will thereby be promoting not only the general prosperity of the institution, but by thus adding to the profit fund, you will be increasing the value of your own policy.—Faithfully yours,

Henry Lake,
Manager and Secretary.

Thereupon Mr. Coghlan went to the office of the British Nation Association, and there saw Mr. Lake, the manager and secretary, and informed him that he protested against and objected to being passed over to the British Nation. On Mr. Lake's requesting him to have his policy indorsed, he refused to do so, and said he had a Catholic Company's policy, and would not give it up. In Feb. 1861 he went to the British Nation office in order to pay his premium. He requested that a Catholic Company's receipt might be given to him; but a clerk told him that they had no Catholic Company's forms of receipts, and that no other receipt would be given him but a British Nation receipt. After protesting against the refusal to give him a Catholic Company's receipt, he accepted the following receipt:

British Nation Life Assurance Association, with which is united the life and endowment business of the Phœnix Life Assurance Company.
Sum assured, 200*l.*
Receipt, No. 1306, 12th Feb. 1861.
Policy, No. 138c.
Received of Mr. Thomas Coghlan the sum of 5*l.* 15*s.* 4*d.*, being the payment of annual premium from the 13th Jan. 1861 to the 13th Jan. 1862, for an insurance of the sum of 200*l.* on the life of himself, effected by the before-named policy.
Annual premium, 5*l.* 15*s.* 4*d.*

Henry Lake,
Manager and Secretary.

Subsequently he paid his premiums to the British Nation Association, and accepted receipts on the ordinary forms of the British Nation, the policy being referred to as "Policy No. 138, C." On these occasions he does not appear to have repeated his protest.

In 1865 the British Nation Association transferred its business to the European Society, C...

this occasion Mr. Coghlan, to the best of his belief, received no circular announcing the amalgamation. In Feb. 1866, he went to the office of the Europeau Society, and paid his premium, as he alleged, "under protest," and accepted the following receipt.

British Nation Life Assurance Association, in union with the European Assurance Society.
Receipt No. 28708.
Policy No. 138. Sum assured £200.
Received the 3rd Feb. 1866, the sum of 5*l.* 15*s.* 4*d.*, being the payment of yearly premium from the 13th Jan. 1866, to the 13th Jan. 1867, for an assurance on the life of T. Coghlan, effected by the before-named policy.
5*l.* 15*s.* 4*d.* HENRY LAKE, Manager.

Subsequently he paid his premiums to the European Society, but did not repeat his protest. The receipts in 1869 and afterwards were in the following form:

European Assurance Society.
No. 18,326.
Preminm 5*l.* 15*s.* 4*d.* on the life of T. Coghlan.
Received the 5th Feb. 1869, the sum above stated, being the amount of premium for the renewal of policy No. 138, for twelve months from the 13th Jan. 1869, according to the tenour of the said policy.
J. M. JONES, GEO. R. LAMBERT } Directors.

An order for winding-up the European Society was made on the 12th Jan. 1872. Mr. Coghlan now claimed that he was not a creditor of the European Society in respect of his policy, but of the Catholic company, which originally granted it, and that, as such creditor, he was entitled to have the company wound-up.

A reversionary bonus had been declared by the British Nation Association in May 1863, and also by the European Society in April 1867; and a circular announcing the bonus had on each occasion been sent to Mr. Coghlan, but he took no notice of either of the circulars.

The circular sent by the European society was in the following form:

Bonus Notice.
European Assurance Society,
April, 1867.
Policy No. 138c.
Life of T. Coghlan.
I am instructed by the board of directors to announce to you that a valuation of the affairs of this society up to the 31st Dec. 1865, has been completed, and that an allotment of reversionary bonus to that period has been made. I have great pleasure in informing you that the reversionary sum added to the above policy is 2*l.* 8*s.* You will please attach this notice to the policy as the official declaration of the bonus addition. The business is still rapidly increasing, and it is hoped that at each succeeding valuation the bonus will be materially augmented.
HENRY LAKE, Manager.

The circular sent by the British Nation was nearly of the same form.

The deed of settlement of the Catholic company contained the following provision:

Clause 161: That whenever two such extraordinary general meetings as hereinbefore mentioned shall have come to a resolution to dissolve the company, the directors shall cease to issue any life or endowment policy, or to grant any annuity, or to enter into any engagement on behalf of the company, and shall proceed, in such manner and upon such terms as they shall think reasonable and necessary, to wind-up the affairs and meet and satisfy or transfer to some other well established life assurance company the existing engagements and liabilities of the company, and shall call in or compound, upon such terms as to them shall seem expedient, all debts owing to the company, and shall cause so much of the funds and property of the company as shall not then consist of money, to be forthwith sold or otherwise converted into money in such manner and upon such terms as the directors shall think proper, and so soon as conveniently may be after such resolution, so much of the funds and property of the company as shall not be required to meet the existing engagements and liabilities thereof shall be paid to and distributed by the directors amongst the shareholders or their respective executors or administrators in the proportions in which they shall be respectively entitled thereto, and immediately after such payment and distribution shall have been completed, these presents and every clause, article, matter and thing herein contained shall thenceforth cease, determine, and be void.

The policy that was granted to Mr. Coghlan by the Catholic Company contained the following proviso:

Provided, lastly, and it is hereby expressly declared, that the subscribed capital and other the stocks, funds, securities, and property of the company, which, at the time of any claim or demand being made in respect of this policy, shall remain unapplied or undisposed of under the trusts, powers, and authorities of the deed or deeds of settlement of the company, shall alone be liable to make good all claims and demands upon the company in respect of this policy, and that no director of the company, by whom this policy is signed, shall be responsible for the payment of or for contribution towards the moneys assured by this policy to any greater extent than the funds or property of the company in his hands or power at the time of such moneys being recovered shall be competent to discharge. And that no shareholder of the company shall in any event whatsoever be liable to or for any demand against the company beyond the amount of the unpaid part of his or her share or shares in the subscribed capital of the company, save so far as he or she may be liable under the provisions of the Act for the registration, incorporation, and regulation of joint stock companies.

Cutler appeared for the applicant.

Napier Higgins, Q. C. (with him *Montague Cookson*) for the official liquidators of the European Society.—The European Society has succeeded to the liabilities of the Catholic Company, and consequently has an interest in preventing any further expense being incurred in winding-up a mere shadow. We are accordingly entitled to appear and oppose the application. With regard to the guiding principles which your Lordship has suggested for our consideration, they would appear to conflict to some extent with decisions in other cases.

Lord WESTBURY.—Pardon my interrupting you. I ought to have added that I carefully exclude all Lord Cairns's decisions, the chief of which you did me the favour to cite and comment upon in *Blundell's case* (*vide infra*). I think those decisions, when properly analyzed, are really based on one fact, which Lord Cairns found or considered that he had found in all the cases, namely that there had been a proposal to the policy holder to accept the new company, and that the acts of the policy holder, after that proposal, indicated clearly his acceptance of the proposal.

Napier Higgins.—No doubt that was so in the majority of the cases, but I should have no difficulty in referring to some cases where Lord Cairns was aware of the fact that no communication was made to the particular policy holder, and where his Lordship imputed knowledge to the policy holder from the fact that he had received documents from the company and had taken receipts upon the face of which there appeared to be some intimation of what had taken place in the way of arrangement between the transferor and transferee companies. I shall endeavour to combat or to modify some of the

principles suggested by your Lordship; but whether these principles or those of Lord Cairns be adopted, there was a novation in this case. There are three distinguishing features of this case. First, the Catholic Company was registered under the 7 & 8 Vict. c. 110. That being so, any person entering into a contract with them must be taken to have made himself acquainted with their deed of settlement; whether he did or not, he must be bound by it. (*Ernest* v. *Nicholls* 6 H. L. Cas. 418.) Moreover, in the policy reference is made to the Catholic Company's deed of settlement. Now the clause of the deed contains a provision of an unusual character. It provides that the directors may in their discretion dissolve the company and transfer the assets and the liabilities to some other company without requiring any consent on the part of the policy-holder. It is not unreasonable to give so large a power to directors; for in case of a dissolution this would be a more advantageous proceeding than to give to each policyholder the estimated value of his policy, or to have the company wound-up in Chancery. That a policy-holder may be bound by such a provision is quite clear from *Mosley's Case* (*Albert* Arbitration minutes, p. 953). [LORD WESTBURY.—That case was of this nature. Mr. Mosley thought he had a claim against the Times Company. It turned out in the mind of Lord Cairns, according to the true interpretation of the deed and what had taken place, that, before the claim was presented, the Times Company had been effectually dissolved and put an end to, and therefore Mr. Mosley brought his claim against a non-existing company.] The reason why the dissolution was effectual was that these special provisions in the deed of settlement enabled the company to do what it otherwise could not have done—to dissolve itself, and to get rid of all liability to policy holders. [LORD WESTBURY.—Can you show me anything in the clause of the Catholic Company's deed of settlement that requires me to extend its interpretation beyond the ordinary interpretation of a partnership clause? It is perfectly good between the partners, but although the policy holder knew of it, how is he bound by it?] He can only claim against the funds of the company and subject to the trusts, powers and authorities of the deed of settlement. This is a trust, power and authority of the deed of settlement. [LORD WESTBURY.—He can only claim against the funds of the company, but a provision regulating the appropriation of those funds, which is good *inter socios* is not good against him, unless he has distinctly consented. It only brings us back to this, whether a power which is good *inter socios*, can be used to diminish or destroy the rights of a creditor contracting with the company.] It could not be so used, if the creditor were an ordinary outside creditor; but a policy holder contracts with reference to the funds of the company, and his contract is bound by the provisions of the deed of settlement. [LORD WESTBURY.—Your case would be a good one, if you could find in the deed such words as these: "And it is hereby agreed that what shall be done under this clause shall be binding on the creditors of the company as well as on the shareholders thereof."] I submit that the clause is equally binding without any such words. A policy holder in such a case is not wholly precluded from objecting to any proposed arrangement with respect to the fund; he cango to the Court of Chancery and complain that the directors, the trustees of his fund, are going to make an improper use of the trust fund.

Kearns v. *Leaf*, 1 H. & M. 681;
Bishop v. *Scott*, L. T. Rep. N. S. 570.

The second peculiar feature of this case is that Mr. Coghlan received circulars announcing the amalgamation; and he subsequently paid his premiums to the transferee company, and accepted receipts from them. And there are numerous decisions in the *Albert* arbitration which show that this was sufficient to effect a novation. [LORD WESTBURY.—Was the Phœnix company constituted in the same manner as the Catholic?] I have not been able to get the deed of settlement of the Phœnix company, and, consequently, cannot say. However, events subsequent to the transactions with this company will displace the necessity of going into that. [LORD WESTBURY.—I do not know. If this gentleman never became one of the flock of the Phœnix, how could he be transferred by the Phœnix to the European? What possible reason can there be for holding him to have been attached to the European when he did not take part in any one of the intermediate steps?] A man may choose, years after his policy has expired, to adopt some arrangement for the revival of his policy with another office; and whether the arrangement with the Phœnix was valid or not, the course of dealing shows that he went over to the British Nation, and had an incontrovertible claim against them, and subsequently he adopted the European Society. There are many decisions both in the Court of Chancery and in the *Albert* arbitration which show that, although the arrangement between the companies may not be valid, yet novation may be effected by some transaction between the policy holder and the transferee company. [LORD WESTBURY.—Let us understand that. If Company A. transfers to Company B., and Company B. gets the power or has the power to adopt the liabilities of Company A. or to renew those liabilities, or to make them its own by new contracts, and it does so, then it is not necessary for the validity of those new contracts to show that the transactions between Company A. and Company B. are unimpeachable. That is all I think your decisions go to. That may be readily acquiesced in; because by the transaction I get a new contract substituted for my old one, and the contract, which is so substituted, is made by a party who has power to enter into it, and therefore between that party and the policy holder it is a concluded transaction. Will you tell me what took place on the amalgamation of the Catholic Company with the Phœnix? Were there two extraordinary general meetings of the shareholders of the Catholic Company? Until that is shown me, I shall not hold that there was any transfer at all.] I am unable to say what was done on this occasion, but I submit that it would not be material to consider whether the provisions of the deed of settlement were complied with *modo et formâ*; novation may have been effected by the subsequent act of the parties. [LORD WESTBURY.—First, I must get the Phœnix in a condition to novate; then the British Nation; and then the European; and for all and each one of those steps it will be requisite to prove that the whole of the debts and liabilities were transferred, or attempted to be transferred; first to the Phœnix, then to the British Nation, and then to the Euro-

pean. The first step in the ladder for you to rise by is the Phœnix Company.] In none of the *Albert* arbitration cases did Lord Cairns require step by step that there should be proof of the valid transfer from one company to another. The principle established by Lord Cairns was this: Mr. Coghlan comes to prove on a Catholic policy against the Catholic company. He must prove payment of his premiums to the Catholic company; he cannot do so; he must then prove payment to some one acting as the agent of the Catholic company; if he can do so, his claim succeeds; if he cannot, it fails. This is the case, even if there are no circulars announcing the amalgamation; but here such circulars were sent to the policyholder. The third feature of the case is that Mr. Coghlan received two circulars offering him a bonus, one from the British Nation and the other from the European. These bonuses were not expressly accepted by him; but on the other hand they were not repudiated, and Lord Cairns has held in such cases that an acceptance must be inferred, and this would effect a novation.

Knox's Case, Albert Arbitration, 16 S. J. 673;
Allen's Case, Albert Arbitration, 16 S. J. 657;
Wernincк's Case, Albert Arbitration, 15 S. J. 767;
Spencer's Case, L. Rep. 6 Ch. 362.

[LORD WESTBURY.—I do not think that these cases will govern anything. The only question I shall have to decide will be this. Did Mr. Coghlan adopt the European? Did he come in and ally himself with the European Company, and accept that company as the persons that were bound to him? I cannot say that he did any such thing.] The only thing that at all tends to show any desire on his part not to novate are his protests, but these were merely verbal, and they indicated a frame of mind from which he could at any time depart; and that he did actually so depart, is shown by his subsequent payment of premiums without repetition of the protest. Such protests must be ineffectual after the lapse of so many years. The transferee company could not now take advantage of them if the state of affairs were reversed and he were claiming against them. Lord Cairns lays down principles with respect to protests in

Rivaz's Case, Albert Arbitration, 16 S. J. 590;
Warne's Case, Albert Arbitration, 16 S. J. 631;
Wood's Case, Albert Arbitration, 15 S. J. 693;
Richter's Case, Albert Arbitration, Min. p. 756;
Dorning's Case, Albert Arbitration, 16 S. J. 673;
Howell's Case, Albert Arbitration, 16 S. J. 632.

LORD WESTBURY.—Mr. Cutler, how can I give you an order to wind-up the Catholic Company? You have not brought them here.

Cutler.—There is nobody whom I can serve.

LORD WESTBURY.—Why am I to wind-up a thing, which, as far as I know, has no existence?

Cutler.—We might find some persons who might be made liable.

LORD WESTBURY.—I cannot make an order against the company, unless they appear here. The company do not appear here, and therefore I can make no such order. That part of the application may be brought on hereafter under more favourable circumstances. Of course it will be for you to consider this, because if you deliberately unhook yourself from, or rather refuse to be hooked on to, the European, and deliberately prefer to chase after the Catholic Company, you may or you may not, have a right against the European. No doubt you will be entitled, when you have done that which amounts to substituted service, to come here and apply for an order to wind-up the Catholic Company.

Napier Higgins.—I would suggest that the most advisable course might be for Mr. Coghlan to ascertain who were the shareholders of the Catholic Company at the date of the transfer to the Phœnix: to ascertain whether any of those shareholders, and particularly whether any directors then acting in the business of the company are now alive; and, if so, to inform your Lordship of that fact, and get directions as to serving some citation or notice upon three or four of these gentlemen, and then they would, according to the practice of the Court of Chancery, be admitted to represent the company.

LORD WESTBURY.—That is a practical suggestion.

Cutler.—I am indebted to Mr. Higgins for it. I am now in a position to make the application, because I have in my hand a list of names of persons of position in the Catholic Company that can be served. Therefore I take this opportunity of asking your Lordship to make a declaration that service upon the Rev. Thos. Doyle, Mr. Edmond Beales, and others may be good service upon the Catholic Company.

LORD WESTBURY.—If the solicitor will make an affidavit that he knows they were members of the Catholic Company at the time of the transfer of its business to the Phœnix, and that they live at such and such places, I will give him leave to serve them with notices and declare that such service shall be considered as service upon the Catholic Company.

Cutler was not heard in support of the application.

LORD WESTBURY.—

I think the decision in this case will turn very much on the special circumstances. However, it is necessary to observe particularly upon the very bare way in which this matter comes before me, and the paucity of materials in point of fact upon which I shall be compelled to decide it. The question arises in the following form: Mr. Coghlan asks for an order to wind-up a company that I will call the Catholic company: notice of the application being served upon the present joint official liquidators, they appear for the European Society and contend that Mr. Coghlan is not a policyholder of the Catholic Company, but is a policyholder of their own society. Now, the process by which they seek to prove that Mr. Coghlan is a policyholder of the European Society is somewhat of this nature: It is said very truly that after the policy of Mr. Coghlan was effected with the Catholic Company, that company transferred its business to the Phœnix Company, and then it is said the Phœnix Company transferred its business to the British Nation, and then it is said the British Nation transferred its business, which, I suppose, is to be taken as the accumulated business of itself and the Catholic and the Phœnix companies, to the European. Now what the terms of these transfers were, we are not able to ascertain. We know only the fact that the business was transferred. Whether the Phœnix was authorised to take up, adopt, and renew the liabili-

ties of the Catholic Company, I cannot tell. Whether the British Nation had power to adopt and renew the liabilities of the Catholic and Phœnix companies, I cannot tell. Neither can I tell, so far as the case before me is concerned, what were the immediate terms of the transfer of the British Nation to the European. But the question in all these cases is simply this—a question of the effect of what was done by the policyholder, and of the intention of the policyholder in doing those things. It has been argued at the bar here—and I am sorry to say that some colour is furnished for that argument by some of the technical decisions that have been cited—as if it were incumbent upon the policy holder to prove that he did not intend to adopt and to accept by way of substitution the liability of the transferee company. That is quite an inversion of the proper order. It is incumbent upon the company which alleges a substitution, or what has been termed novation, to prove an agreement by the policyholder to make that novation and to prove acts of the policy holder in the absence of any definite written declaration, that unequivocally involve the evidence of that intention on the part of the policyholder to accept the new company instead of the old. Now, of any intention on the part of the policyholder to accept either the Phœnix, or the British Nation, or the European in lieu of his own original company, there is not the least trace of proof, but on the contrary there is everything to warrant my finding and declaring that it was not the intention of Mr. Coghlan to accept the Phœnix in lieu of the Catholic, or to accept the British Nation in lieu of the Phœnix, or to accept the European; and when I am told that he ought to have continued these protests of his down to the last moment, I cannot help contrasting that argument on the part of these companies with the manner—the unrighteous and unjust manner—in which Mr. Coghlan was treated by them. His etters earnestly request in the very outset that he might have a receipt of his own company for his premiums. He requests again most earnestly that he might know where to pay the premiums, in order to be certain it was a payment to the Catholic Company who contracted with him. Those letters are met by the greatest evasion. At length he is driven to the office of the British Nation, and then to the office of the European, in order that he might have some recipient of his premiums. He there begs that he might have a receipt indicating the manner in which he paid those premiums, and some clerk tells him "We shall give you no such receipt, and unless you take our receipt, you shall have none at all." And then it is argued before me that because the poor man was thus compelled to take such a receipt as those men chose to give him, therefore he deliberately took that receipt as a thing done in the performance of a new and substituted contract, and that he ought to be held to have deliberately, and with perfect knowledge of what he was about, accepted the new company in lieu of and in substitution for the old. I cannot come to any such conclusion. I cannot find in the conduct of this gentleman the least evidence of an intention to change the persons with whom he had contracted, or to accept a new contract in lieu of the old. Nor have these individuals furnished me with the least proof that they had the right or the power to substitute a new contract and to accept from Mr. Coghlan the surrender of the old. Now I will certainly endeavour, as far as I possibly can, to have these cases treated in a large and liberal manner, and I will not have technicalities used for the purpose of clouding a case and obscuring what any man must discern to be the truth and justice and honour of the case. It is impossible for anyone to read this case and say that there ever was a time at which Mr. Coghlan was willing to accept any one of these substituted companies as his sole crediters in this matter. Then why am I to fasten upon a man a new contract, and to fasten it upon him *in invitum?* I have no power to do any such thing; and if I had the power, I have not the inclination. Observe how individuals are treated by these companies, who assume the power of handing them over from one to another; those who receive them assume the power of ignoring their rights, and refuse to listen to any of their reasonable applications. Then, as in this case, at the end of a great deal of opposition, the policy holder is told, "You have struggled to keep to your original contract; we have defeated you, and although you came here and paid your premiums in the only manner in which it was possible for you to pay them, although we know perfectly well you did not come voluntarily, that you came here only by the duress of being told that, if you did not pay them here, your policy would be gone; yet we will now turn round and say to you—Mr. Coghlan, you were perfectly well satisfied; you took us, and accepted us with pleasure, you have renewed or rather made with us a new and substituted contract, you have lost your old one, and therefore you shall not have the benefit of all the efforts you have made to preserve it;" nothing to my mind is more unjust, more discreditable, and more to be condemned than conduct of that description. It then appears that after Mr. Coghlan had announced to these people that in his own mind he was merely the holder of a policy in the Catholic company, one of those companies sent a letter announcing that they had added a sum of money to his policy to be received when the policy became due, and that Mr. Coghlan, acting as every sensible man would naturally act, took not the slightest notice of the letter. Then I am deliberately told, and cases are cited to prove, that because Mr. Coghlan took no notice of that letter, therefore he accepted the transaction, and therefore he entered into a new contract with the European, and that alone is sufficient evidence that he regarded himself as a policyholder in the European, and not as a policyholder in the original company. I will draw no such inference, and I am confident that these technical modes of viewing these matters, which have been too numerous, have led to the necessity in the mind of the Legislature of laying down a rule that should save men from having things imputed to them which were directly contrary to their intention and to the just meaning of their acts, by adding what on various occasions the law has found it necessary to require, namely, some writing declaring the mind and intention of the party. It had become necessary to prevent the rights of men being defeated by innocent or equivocal acts being tortured into evidence of conclusions directly opposed to what they themselves held and what they intended to act upon. When,

therefore, I find a case in which by unequivocal acts a man has accepted a new company, which has the power of contracting with him, in lieu of the old company with which he contracted, I shall give effect to the new contract; but to raise that new contract, there must be on the part of the new company a power to make it, and there must be on the part of the policyholder a knowledge of the company's right so to contract with him; and where it is an incomplete contract, or where there is no evidence in writing, there must be conduct on the part of the policyholder that unmistakeably shows that he intended to accept the new contractor and to discharge the old. Then that word *novation*, or what I should prefer, the substitution of the new contract in lieu and in discharge of the old, will be a thing established, and which I can with satisfaction declare to be the fact; but, unless that is found to be the case, I must decline to deprive a man by violence of his existing contract, giving him another contract instead, and then mocking him by telling him, "You know that you intended to take that other contract; that is clear from acts which no doubt you regarded as having no such meaning as the law, wiser than you, will impute to them, although it be a meaning directly contrary to your intention." The official liquidator's costs will be borne by the European Society, and Mr. Coghlan will get his costs, upon a future occasion, out of his own company, if that company should ever be wound-up here. With regard to the method of disposing of this application, I think it had better be disposed of by the declaration I have already made, and which at present may be regarded as a declaration in Mr. Coghlan's favour, namely, that no liability of the Phœnix, or of the British Nation, or of the European has been substituted or accepted by him in lieu of the original liability of the Catholic. And with that declaration I give him leave to serve the affidavit, to be made by him, on those shareholders of the Catholic company that have been mentioned, and say he is going to make an application for a winding-up order.

Cutler.—Then I presume I need only serve the company.

Lord WESTBURY.—I cannot give you any directions about that. Those persons you name to me are very likely to be a sufficient channel to bring your application to the knowledge of all the representatives of the company.

Napier Higgins.—According to the practice of the Court of Chancery they ought to be informed that by the direction of your Lordship they are served as representing the company, and that they have the duty of representing the company.

Lord WESTBURY.—I cannot at present fix upon them the character of representing the company with the view of having the company represented here.

Solicitors for the applicant, *Kynaston* and *Gasquet*.

Solicitors for the official liquidators of the European society, *Mercer* and *Mercer*.

Oct. 31 *and Nov.* 5, 1872.

BLUNDELL'S CASE.

Life assurance company—Amalgamation of companies—Winding-up—Policy—Novation of contract—Payment of premiums—Receipts—Policyholder held, after an amalgamation, to be a creditor, not of the new company, but of the old—Novation of the Civil Law.

In 1855 *A. effected a policy on his own life with the B. C. Life Assurance Company, through one of their local agents. In* 1863-4 *the B. C. Company transferred its business to the B. N. Life Assurance Association, and in* 1865 *the B. N. Association transferred its business to the E. Life Assurance Society. On neither of these occasions did the policyholder A. receive any of the circulars announcing the amalgamation, and he never had any intimation of the arrangements between the companies, save what was conveyed by the premium receipts. From* 1855 *to* 1871 *he paid his premiums to the same local agent, at the same offices, and received his premium receipts through him. After the amalgamation of the B. C. Company with the B. N. Association, these receipts were headed "B. N. Association, with which is united the business of the B. C. Company," and ultimately they were headed "E. Assurance Society." The policy was referred to in all the receipts as "No.* 8779," *being the number of the original policy. No bonus or intimation of a bonus was ever received by the policyholder from any of the companies.*

In the winding-up A. claimed to prove on his policy against the B. C. Company, which originally granted the policy; but the official liquidator of that company contended that there had been a novation, first with the B. N. Association, and then with the E. Society.

Held, that there was no novation, and that A. was still entitled to claim against the B. C. Company.

Where there is a transfer of business from one insurance company to another, and a policy holder afterwards pays his premiums to the second company, the act is equivocal: he may be regarding that company as authorised by the first to receive the premiums, or if the transferee company has power to grant a new policy identical with the old, he may be intending to effect a novation of contract with that company. The onus of proving the intention to novate lies on the company that alleges it. Unless that intention is shown in the clearest manner, the payment of the premiums will be referred to the old contract.

Receipts given in the name of the transferee company are not of themselves sufficient to show an intention on the part of the policyholder to effect a novation.

Where a company, which is the assignee of the business of another company, and which has power to grant new contracts in lieu of the old, writes to a policyholder, offering him a new contract, and the policyholder does not return any answer in writing, but immediately goes and pays his premiums to the company making the offer, there is an acceptance of the offer, and consequently a novation of the contract.

Novation of the Civil Law referred to.

THIS was a question of novation.

The British Commercial Insurance Company was established under a deed of settlement dated

the 1st May 1821. This deed contained the following provisions with reference to receipts, policies, dissolution, &c.:

Clause 72:

That the receipt or receipts in writing of the trustees, or of the directors for the time being, or any one of them, attested by the managing director for the time being, or the actuary, for any money belonging to, or payable for, any property of the company, and which shall have been paid to the bankers for the time being of the said company, or to the treasurer of the said company, shall effectually discharge the person or persons paying the same money, from being obliged to see to the application thereof, or from being answerable or accountable for the misapplication or nonapplication thereof.

Clause 91:

That every deed to insure in any sum in gross, or secure annuity granted by the company, and every deed or instrument to secure an endowment for a child or children, and for securing deposits in the investment fund, and every other insurance on behalf of the said company, shall be signed and duly executed by three directors at least, or the same shall not be binding on the said company.

Clause 109:

That the funds or property of the company for the time being remaining unapplied and undisposed of, in pursuance of the trusts, powers, and authorities contained in these presents, shall alone be answerable for the claims and demands of persons assuring with the company, and to their annuity, endowment, and deposit creditors, and the directors signing the policies or the instruments securing the annuities or endowments, or deposits, shall not, except under actions of covenant to be brought as aforesaid, and subject to the restrictions aforesaid, be personally liable to the persons to whom the policies shall be given, or annuities granted, or their executors, administrators, or assigns. But it shall be the duty of the directors for the time being to order the application of the said funds or property by the said trustees for the time being in discharge of the money secured by the said policies, and of the said annuity endowments, and also that to the persons claiming under the said policies, or to the persons entitled to the said annuities, endowments, or deposits, the proprietors at large of the company shall not be answerable directly or indirectly, further or otherwise than as to their respective shares of the said capital stock of one million pounds paid, and to be contributed as aforesaid, or which shall then remain unpaid. It being the true intent and meaning of these presents that no claim on any policy, or upon any instrument securing any annuity, endowment, or deposit, shall be enforced in any other manner or by any other means than expressed in these presents, anything to be made, done, or executed by the court of directors, or any directors or director, or the trustees or other officers, or members of the company, or by any general court of the company, or otherwise to the contrary thereof in anywise notwithstanding.

Clause 112:

That two successive special courts of proprietors, duly called for that purpose, one at the distance of three calendar months from the other, may resolve and decide that the said company shall determine and be dissolved on a day to be fixed for that purpose, and thereupon the same company shall be dissolved accordingly on the appointed day; and the then actuary, or if there should not be any actuary, then an actuary to be appointed for the purpose, shall cause every existing policy outstanding against the company to be valued, and such valuation shall be submitted to and altered or varied as the patron, president, and vice-presidents for the time being, or the major part in number of them, shall approve, and when so approved such valuation shall be final and conclusive on all persons concerned in interests; and all the assets of the company shall be converted into money by sales and other dispositions; and the directors for the time being, and in their default the patron, president, and vice-presidents, or the major part of them in number, shall make an order for the distribution of the assets, including the capital, whether paid or made up or then due under the said covenants between the persons insured with the said company, and rateably and in proportion to the estimated value of the then policies and insured interest, and without any priority except as hereinafter-mentioned, and in full satisfaction of the same interests, whether vested or contingent, and whether the event against which such insurance shall be effected shall or shall not have happened, and the deficiency, if any, in the funds shall be borne by the insured rateably and proportionately, according to the value of their policies or insured interests; and the surplus, if any, of the funds of the said company, including capital not so applied, shall be divided between the persons who shall be the proprietors of shares at the time appointed for the dissolution of the said company, or their respective executors, administrators, and assigns, rateably and in proportion to their shares in the capital of the said company, after an allowance for the demands, if any, on the company on such proprietors for any money due from them to the company. But in the distribution between the persons who shall be insured, persons who shall not be proprietors of shares shall be in respect of their insured interests preferred to and paid in priority over persons who may be proprietors, and such proprietors shall be paid rateably as between themselves before a division among proprietors or shareholders as such, independently of their being insured.

The deed contained no provisions for the amalgamation with or for the transfer of the business to any other insurance company.

In 1859 negotiations were commenced for the purpose of transferring the business of the British Commercial Company to the British Nation Life Assurance Association. This association was established in 1855 under a deed of settlement, which provided (*inter alia*):

Clause 30:

That the votes of three-fourths of the qualified associates present, and not declining to vote at two successive extraordinary general meetings, or at the ballot, or ballots which for the purpose of ascertaining the sense of the qualified associates at large, may be taken in consequence of being demanded at such meetings or either of them, shall be requisite to authorise the amalgamation of the association with any other company or society or the dissolution of the association.

Clause 45:

That an extraordinary general meeting may accept or take a transfer of or purchase or acquire the business of any other associations, companies, or societies of a similar nature (wholly or in part), with the association hereby established upon and under such terms, conditions, stipulations, and agreements as such meeting shall think fit.

Clause 46:

That (subject to clause 30) an extraordinary general meeting shall have full power to resolve on the dissolution of the association, and if at such meeting a resolution shall be passed to that effect, then a second extraordinary general meeting held within fifty days after the date of such resolution, shall have full power to reject or confirm the same.

Other clauses provided the method of carrying into effect the transfer of the business to another company.

On the 17th Nov. 1859, a letter was sent by Mr. Lake, the secretary of the British Nation Association, to the directors of the British Commercial Company, proposing a "union of the business of the British Commercial and British Nation Companies" on the following terms:

That the shareholders of the British Commercial should be paid off at the rate of 25*s.* per share, and their shares transferred. That the directors of the British Commercial with the consent of the shareholders be paid a compensation of 1000*l.* by this association. That the staff of the British Commercial be retained by the British Nation, and that the directors of the British Nation be at liberty to apply to any director or officer of the British Comm

such proposed arrangement after the shareholders have decided upon its adoption.

That trustees should be appointed to hold the assets of the British Commercial pending the completion of the proposed arrangement.

That an Act of Parliament should be forthwith applied for, if agreed to be necessary, to consolidate the proposed union.

On the 20th Jan. 1860, an extraordinary general meeting of the shareholders of the British Nation Association was held, and it was resolved that the proposed arrangement for the amalgamation be approved of, and should be carried into effect, and "that the directors of the British Nation Association be, and they are hereby empowered to appoint from time to time such trustees, whether shareholders or others, as may in their discretion be necessary, for holding such shares of the British Commercial Company as in the arrangements contemplated may be required to be transferred."

On the 21st Jan. 1860 an extraordinary special court of the proprietors of the British Commercial Company was held, and the proposed arrangement for amalgamation was adopted.

Subsequently, by a deed dated the 8th Feb. 1860, certain of the shareholders in the British Commercial Company, holding 11,840 out of the 12,000 shares, transferred their shares to Messrs. Bermingham and Lake; and by a deed dated the 7th June 1860 Messrs. Bermingham and Lake declared themselves to be trustees of those shares for the British Nation, and the British Nation covenanted to indemnify them in respect thereof.

Finally, by a deed dated the 31st Dec. 1864, after reciting *inter alia* that the 11,840 shares, so transferred as aforesaid into the names of Messrs. Bermingham and Lake constituted the whole of the shares subscribed for in the capital of the British Commercial Company, except some few shares, the owners of which were unknown, and the right to which was considered to have been lost by lapse of time and non-claim or otherwise, it was witnessed that the holders of these 11,840 shares transferred and disposed of them to the British Nation Association, and also all their interest in the life assurance business theretofore carried on by the British Commercial Company, "to the intent that the British Commercial Company, and the capital and business thereof, might thenceforth be amalgamated with and merged in the British Nation Association, and the capital and business thereof;" and by the same deed the British Nation Association covenanted with the holders of these 11,840 shares that the association, its successors, or assigns, would pay every debt owing by the British Commercial Company, and would at all times save harmless and keep indemnified the holders of the said shares against all actions, suits, proceedings, &c. whatsoever, in respect of these debts, or in respect of any policy of assurance, grant of annuity, or other security theretofore issued or granted by the British Commercial Company.

In 1865 the British Nation Association transferred its business to the European Assurance Society. This transfer was carried into effect by a deed dated the 16th March 1865, whereby it was agreed

That on, from, and after the execution of these presents, the British Nation Association and the European Society are and shall be and become united, amalgamated, and consolidated as one association, society, or company, under the name or style of "The European Assurance Society," until such name or style shall be changed by the authority of Parliament.

And it was witnessed that

The British Nation Association doth hereby assign unto the European Society, its successors and assigns, all that the interest and goodwill of the British Nation Association of, in, and concerning all the life assurance, endowment, annuity, and other the business or businesses heretofore carried on by the Association, and of and in all matters connected therewith, and the full benefit and advantage thereof, and all the estate, right, title, interest, property, possibility, claim, and demand whatsoever of the British Nation Association, and all policies of reassurance with any other company or companies, and all premiums, profits, fines, and other moneys due or to become due to the Association in respect of the said policies and annuities respectively, and in respect of the said business hereinbefore mentioned or otherwise howsoever, together with all moneys or balances due from or in the hands of agents of the Association, and all stocks, funds, securities, and personal estate, credit, and effects whatsoever or wheresoever, of, or belonging, or owing to the association.

And there was a covenant by the European Society

To undertake, pay, or perform all and every of the existing bond and other debts, assurances, annuities, endowments, guarantees, and other engagements, or liabilities of the British Nation Association, and to, at all times hereafter, save, defend, keep harmless, and indemnified the Association and the individual proprietors of shares in the capital thereof from and against all actions, suits, proceedings, costs, damages, claims, and demands whatsoever, for, upon account, or in respect of the same.

In 1855 Mr. Blundell effected a policy of assurance on his own life with the British Commercial Company, through their agent at Castlerea, Mr. Mahoney. Down to 1871 Mr. Blundell paid his premiums through Mr. Mahoney, at the same offices at Castlerea, and received the premium receipts through him. On neither of the amalgamations, did Mr. Blundell receive any of the circulars that were issued announcing the amalgamation; and he never received any intimation of either of the transfers of business, save such information as was conveyed to him through the premium receipts. In all the receipts given by the British Commercial Company the policy was referred to by its number, 8779. In 1861 and and 1862 these receipts were in the following form:—

British Commercial Life Insurance Company, London, united with the British Nation Life Assurance Association.

Sum assured, £400. Policy No. 8779.

Received the 6th day of April 1861, the sum of ten pounds 18*s.* 9*d.*, being half the premium of insurance on 400*l.* and interest for one year, from the 27 March 1861, on the life of Rev. R. Blundell.

In 1863-4-5, the receipts were in the following form:—

British Nation Life Assurance Association, with which is united the business of the British Commercial Life Insurance Company.

Policy No. 8779.

Received this 26th day of March, nineteen pounds and nine pence, being the payment of a yearly premium from the 27th day of March, 1863, to the 26th day of March, 1864, for an assurance on the life of Rev. R. Blundell, effected by the before-named policy.

In 1866 the receipt was as follows:

British Nation Life Assurance Association, in Union with the European Assurance Society.

Policy No. 8779.

Received the 28th day of March 1866, the sum of nine-

teen pounds and ninepence, being the payment of twelve months' preminm and interest from 27th March 1866, for an assurance on the life of the Rev. R. Blnndell, effected by the before-named policy.

And from 1867 to 1871 the receipts were in the following form:

European Assurance Society.
Policy No. 8779.

Received this 2nd day of April 1867, the sum of nineteen pounds and ninepence, being the payment of twelve months' preminm and interest from the 27th March 1867 for an assurance on the life of Rev. R. Blundell, effected by the before-named policy.

There was never anything affixed to Mr. Mahoney's offices to intimate that any change had taken place in the British Commercial Company, or that that company had transferred its business to, or had become amalgamated with, any other company, or that the persons receiving the premiums were acting as the agents of any other company than the British Commercial Company.

No bonus or intimation of any honus was ever received by Mr. Blundell from any of the companies.

He now claimed to be entitled to prove on his policy against the company that originally granted it, namely, the British Commercial Company; on the other hand, the official liquidator of this company contended that he must claim either against the British Nation Association, or against the European Society.

H. M. Jackson appeared for Mr. Blundell, aud contended that there was no amalgamation between the British Commercial and British Nation Companies, and secondly, that, if there was, there was no novation of contract by the policyholder, either with the British Nation Association or with the European Society.

Lord WESTBURY.—The affirmative of these two issues is on the other side. The course, therefore, that I wish you to adopt is this: You produce your policy, and you produce the evidence of your having paid the premiums under that policy. That will constitute a *primâ facie* case on your part. I accordingly call upon the other side to argue in support of the two propositions, that there was a good amalgamation, and that there was an effectual novation.

Napier Higgins, Q.C. and *Montague Cookson*, for the official liquidator of the British Commercial Company.—There was an effectual amalgamation, and by it the liability was wholly transferred from the British Commercial Company to the British Nation Association. [Lord WESTBURY.—I wish we could come to a mutual agreement not to use that term "amalgamation." Nobody uses it with any definite idea, and you are using it just now as if it involved the merger of the British Commercial Company in the British Nation Association. Now that would be directly contrary to all that has been told me, which is nothing more than a transfer of the shares, and of the business in the nature of a purchase, one of the considerations for which was the covenant to indemnify the British Commercial Company—a transaction which involves two things, the continued existence of the covenantee, and the separate existence of the covenantor. Suppose you call it a welding.] Whether or not there was any such welding as we contend for, a novation was created by the subsequent transactions of the policy holder with the British Nation and the European Society. [Lord WESTBURY.—Before we come to consider the effect of this gentleman's transactions, I must know from you whether you contend that the British Commercial Company still was *in rerum naturâ* existing, or whether you are prepared to contend that it was absorbed, swallowed up, and annihilated in the British Nation Association. In considering the question of novation, we must of necessity determine before it arises whether the first company that entered into the contract exists or not. If it does not exist, then the shareholder must seek his remedy elsewhere; but if it does exist, then you say the policyholder deliberately quitted the company with whom he contracted and took a substitute in lieu of the original contracting party.] We contend that the British Commercial Company was in law and in fact absorbed in the British Nation Association, and annihilated, and that thenceforward the policy holder was obliged to look to the British Nation Association for payment. With regard to the second question of novation, Mr. Blundell must be taken either to have known all about the arrangements between the companies, or to have known nothing. If he knew, then he must have known that the transferee company were treating him as their own policyholder, and he must have paid his premiums on that footing, and with a clear intention to effect a novation. If he did not know, then he had no right to pay the British Nation or the European rather than any other company, and he cannot in that case allege that he had paid the British Commercial anything, and his policy has lapsed. There are many cases which show that this acceptance of receipts by the policyholder is sufficient to evidence an intention to effect a novation. We may adopt the words of Vice-Chancellor Malins, in *Re National Provincial Life Assurance Society, Fleming's Case* (L. Rep. 9 Eq. 306): "If he did not intend to acquiesce in the transfer of liability, it was his duty to say so. But he did not take that course; without a word of objection, without remonstrance, he paid his premiums for several years to another office, and does not justice require that he should be considered as having, although not by express contract, yet by silence, acquiescence and conduct, adopted such a course, as binds him to adopt the new office, and to relinquish the liability of the old one?" Having adopted the European Society he has no right to prove against the British Commercial Company. [Lord WESTBURY.—I always understood that a man may have a right to prove against two; when he has elected to prove against one he has lost his right to prove against the other, but until he elects, there is no such obligation. This man may or may not have had a right to prove against the European Society. Possibly he may, because the European Society are bound by the contract with him. If he did do so, I should not allow him to prove against the British Commercial Company.]

The following cases were also cited:
Budden's case, Albert Arbitration, 16 S. J. 462;
Fagan's case, Albert Arbitration, 15 S. J. 855.

[Lord WESTBURY.—There seems little doubt but that Lord Cairns decided *Fagan's case* on the effect of the circular. I do not think the decision is limited to the words "additional security." *Budden's case* was decided with reference to the fact that the policyholder, with perfect knowledge,

took the last receipts from the Albert alone, and that his first act was to prove against the Albert.]

Rivaz's case, Albert Arbitration, 16 S. J. 590.

[Lord WESTBURY.—This case appears to me the plainest thing in the world. Mr. Rivaz receives a letter in which the policyholders in the Western are requested and encouraged to become policyholders in the Albert; they are told of the benefits that will result to them. No answer to that letter is made by Mr. Rivaz, to whom it was addressed, except this answer, that he immediately went and paid his premium to the Albert, and thenceforth continued those payments; and Lord Cairns regards that, and I think with great reason, as being a practical answer to the letter.]

Kennedy's case, Albert Arbitration, Reilly's Rep. p. 5, 15 S. J. 729;
Andrew's case. Albert Arbitration, 16 S. J. 609;
Lancaster's case, 15 S. J. 748.

[Lord WESTBURY.—In *Lancaster's case*, though no circular may have been sent, there was something more important than a circular, namely, the Albert intimated to the policyholder through his solicitor, that they were acting on the assumption that they were to take the policy. Then having that information, he goes and pays the Albert.]

Re Manchester and London Life Assurance Company, L. Rep. 9 Eq. 643; 5 Ch. 640.

Napier Higgins further referred to the difficulty there would be in settling a list of contributories to the British Commercial Company, which was never registered under any Act.

Judgment was reserved.

Tuesday, Nov. 5, 1872.

Lord WESTBURY.—

This case is, I think, singularly devoid of every circumstance that could induce me to hold that Mr. Blundell has adopted and taken the European Society in discharge of the party originally liable to him, namely, the British Commercial Company. It appeared that the British Commercial was a company formed as long ago as the year 1821; it was an ordinary joint stock company of that day. Then, the British Nation was formed by a deed of settlement in 1855, and the case states resolutions that were entered into at meetings of the British Commercial Assurance Company, and among those resolutions it is stated that one James Mahoney was the duly appointed agent of the British Commercial Company at Castlerea, in Ireland. Afterwards a species of union or amalgamation was formed between the British Commercial Company and the British Nation Association. And I read the principal terms of this amalgamation from the deed which is dated the 31st Dec. 1864. By that deed, after reciting that the continuance of the business of the British Commercial Company separate and apart from the business of the British Nation Association, and the severance of the assets of the one company from the assets of the association having been attended with trouble, and having been prejudicial alike to both the parties, it was, on or about the 30th March 1863 considered desirable that the business and assets of the British Commercial Company and of the British Nation Association should be thenceforth amalgamated and united, and accordingly the business and assets had, since a certain day in the year 1863, been in practice amalgamated and united accordingly.—The business of the British Commercial Company, therefore, was carried on as part of the joint business, and not in a separate form.—Well, then, the indenture witnesseth that in pursuance of the resolutions which are recited, the British Commercial Company and their representatives transfer and dispose of unto the British Nation Association all the shares in the British Commercial Company, and all the interest and goodwill of the shareholders and proprietors therein, and all the life assurance business, and other the business or businesses theretofore carried on by the British Commercial Company. And then it is declared that these are assigned to the British Nation Association in order and to the intent that the British Commercial Company and the capital and business thereof might be henceforth amalgamated with the British Nation Association. Now I pause for a moment for the purpose of indicating here a conclusion to which I shall adhere in the process of these windings-up. If company A transfers its business to company B, the transfer in my mind involves an authority to company B to carry on that business, and that would involve power in company B to receive, in the case of policies granted by company A, the premiums payable on those policies, and they would receive those premiums by virtue of the authority impliedly given in the transfer by company A to company B. It is part of the carrying on of the business of company A. If the business is transferred, it involves all the subsisting policies. It involves the right to receive the premiums that became due by virtue of the contracts contained in those policies. If the matter, therefore, does not assume any other shape, or is not transferred into any other contract, all the premiums thenceforth paid by the policyholder at the date of the transfer to company B, the transferee company, will in the first place be considered as received by company B under that implied authority. And if company B mean to say that they have received them in another capacity, and by virtue of a new contract with themselves, and not by virtue of the original contract transferred to them, the duty of proving the new contract and of proving the new relation falls on company B. Well, the amalgamation deed goes on to state a covenant to indemnify by the British Nation Association given to the British Commercial Company; and I beg that it may be observed what that covenant to indemnify necessarily involves. It necessarily involves the fact of the continued existence of the policies and annuities granted by the British Commercial Company, their continuance and existence in accordance with the terms of the original contract. For it is against the original contract that the British Nation covenant to indemnify the British Commercial. And it is said that they will indemnify them from all actions, suits, proceedings, costs, damages, claims, and demands whatsoever, for, upon account, or in respect of, the said debts and sums of money due from the British Commercial Company or any of them, or for, upon account, under, or in respect of, any policy of assurance, grant of annuity, or other security theretofore issued or granted by the British Commercial Company. Nothing can be plainer than a transaction of this kind. The business, the property, the position, the rights of the original company are transferred to their assignee. They delegate to the assignee all the powers requisite for the purpose of carrying on the business and performing its ordinary engagements,

and the second, or transferee company, covenant to indemnify the transferor company against all of these engagements. Of course the transferee company have a right to receive, by virtue of that authority, the premiums payable to the original company, and it is perfectly immaterial what discharge they give, or what form of discharge they give. If they give a discharge in their own names, it is equivalent only to my attorney, having the power of attorney from me, signing the receipt in his own name without adding to it as my attorney. The receipt must be referred to the right that he had to receive, and unless it can be shown that he had some other right to receive than my delegated authority, the receipt must be referred to that authority. Now I mention this because I am by no means disposed to hold that, if a receipt be given by the British Nation Association in its own name, and the policyholder going to pay upon his policy takes that receipt, that the policy holder is to be charged with having entered into a new contract, and that it must be ascribed to him that he paid the transferee company in its own right, and not in the right of the transferor company; and yet these are the means by which we have hitherto frequently arrived at the conclusion that there has been a novation of the contract. I refuse to recognise in that bare fact any evidence of intention by the policyholder to adopt the transferee company in extinguishment of his claims upon the old, and to substitute a new contract with the assignee company for the original contract that he had entered into. Now the Legislature clearly was of that opinion, as I infer from the enactment that was made in the Life Assurance Companies Act of this last session (35 & 36 Vict. c. 41).(*a*) But it is a strange thing that the Legislature in coming to this conclusion, adopted in fact the rule of the civil law, from which law we have borrowed the term "novation." It was a natural thing to refer to the civil law for the purpose of ascertaining what were the rules which in that law governed this question of novation, and it is plain that the civil law utterly excluded these presumptions that have been made, refused to be guided by presumptions and inferences, and excluded all novation where the intent of a creditor to novate was not expressly and plainly declared. The passage is somewhat long. It occurs in the 30th title of the third book of the Institutes of Justinian, par. 3.(*b*) I will read it in the original Latin, that there may be no doubt about the interpretation, but will construe it in a plain manner as I read every passage: *Sed cum hoc quidem inter veteres constabat, tunc fieri novationem cum novandi animo secundam obligationem itum fuerat.* The Latin of the Institutes is not always of the most classical kind, and there may be a difficulty in following it. The translation is this: But inasmuch as this point was well settled among ancient lawyers, that novation was made then, at that time, when the parties entered upon the obligation with an intent of making a novation. That being settled, *per hoc autem dubium erat*, there was nevertheless a doubt on this point—namely, *quando*, at what time, *videretur hoc fieri*, this might seem to be done, *animo novandi*, with

(*a*) Where a company, either before or after the passing of this Act, has transferred its business to or been amalgamated with another company, no policyholder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy shall, by reason of any such payment made after the passing of this Act, or by reason of any other act done after the passing of this Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorised.

(*b*) The following is the whole of the paragraph concerning novation:—"Præterea novatione tollitur obligatio, veluti si id quod tu Scio debeas, a Titio dari stipulatus sit; nam interventu novæ personæ nova nascitur obligatio et prima tollitur translata in posteriorem; adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima novationis jure tollatur, veluti si id quod tu Titio debebas, a pupillo sine tutoris auctoritate stipulatus fuerit. Quo casu res amittitur, nam et prior debitor liberatur, et posterior obligatio nulla est. Non idem juris est, si a servo quis fuerit stipulatus; nam tunc prior perinde obligatus manet, ac si postea nullus stipulatus fuisset. Sed si eadem persona sit a qua postea stipuleris, ita demum novatio fit, si quid in posteriore stipulatione novi sit, forte si conditio aut dies aut fidejussor adjiciatur aut detrahatur. Quod autem diximus, si conditio adjiciatur novationem fieri, sic intelligi oportet ut ita dicam factam novationem si conditio extiterit; alioquin si defecerit, durat prior obligatio. Sed cum hoc quidem inter veteres constabat, tunc fieri novationem cum novandi animo in secundam obligationem itum fuerat: per hoc autem dubium erat, quando novandi animo videretur hoc fieri, et quasdam de hoc præsumptiones alii in aliis casibus introducebant. Ideo nostra processit constitutio, quæ apertissime definivit, tunc solum novationem fieri quotiens hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt; alioquin manere et pristinam obligationem et secundam ei accedere, ut maneat ex utrâque causâ obligatio secundum nostræ constitutionis definitionem, quam licet ex ipsius lectione apertius cognoscere." Justinian's Institutes.—Lib. III., Tit. xxix., par. 3.

Mr. Sandars translates the passage thus:—"An obligation is also dissolved by novation, as for instance, if Seius stipulates from Titius for that which is due to Seius from you. For by the intervention of a new debtor a new obligation arises, and the former obligation is extinguished by being transferred into the latter; so much so that it may happen that, although the latter stipulation is void, yet the former, by the effect of the novation, ceases to exist; as for instance, if Titius stipulates from a pupil, not authorised by his tutor, for a debt due to Titius from you, in this case Titius loses his whole claim, for the first debtor is freed, and the second obligation is void. But the case is different, if it is a slave from whom he stipulates, for then the original debtor remains bound as if the subsequent stipulation had never been made. But if it is the original debtor himself from whom you make the second stipulation, there will be no novation, unless the subsequent stipulation contains something new, as for instance, the addition or suppression of a condition, a term, or a surety. In saying that, if a condition is added, there is a novation, we must be understood to mean that the novation will take place if the condition be accomplished, but that if it be not accomplished the former obligation remains binding. The ancients were of opinion that the novation only took place when the second obligation was entered into for the purpose of making the novation, and doubts consequently arose as to the existence of this intention, and different presumptions were laid down by those who treated the subject according to the different cases they had to settle. In consequence, our constitution was published, in which it was clearly decided that novation shall only take place when the contracting parties have expressly declared that their object in making the new contract is to extinguish the old one; otherwise the former obligation will remain binding, while the second is added to it, so that each contract will give rise to an obligation still in force, according to the provisions of our constitution, which may be more fully learnt by reading the constitution itself:" (Sandars's Justinian, 2nd edit. p. 485.)

an intent to make a novation. It was clear that the *animus* was required; but it was doubtful at what time, and how you were to look for the *animus, et quasdam de hoc præsumptiones alii in aliis casibus introducebant*, and different lawyers in different cases were in the habit of introducing certain presumptions upon the point, namely, when the *animus* arose. *Ideo nostra processit constitutio*, therefore our decree has gone forth; *quæ apertissime definivit*, which has most plainly defined *tunc solum novationem fieri*, that at that time only was there to be considered as made a novation of the prior contract, *quoties*, as often as, *hoc ipsum*, this very thing, *expressum fuerit*, shall have been expressed—not from presumption — shall have been expressed *inter contrahentes*, between the contracting parties, *quod convenerunt* that they had met together *propter novationem* for the purpose of making a novation, *prioris obligationis* of the prior contract; *alioquin*, otherwise *manere et pristinam obligationem* that the old contract would remain, *et secundam*, and that the second contract, *ei accedere*, was to be added to it, *ut obligatio maneat ex utrâque causâ*, in order that the duty, the obligation, might remain from either cause, from either source. It would be difficult to find words to more exactly express the difficulties that were then felt, the ingenuity by which certain presumptions had been introduced, how the presumptions varied in various cases, and the necessity in the mind of Justinian that there should be a definite rule on the subject, which should exclude presumption. And accordingly he made that rule, which the Legislature has embodied in its enactment, that no novation should be arrived at by presumption, but that it must be arrived at by written evidence of the intention of the party. Now this is the old law. If you take the word the law should accompany the word and the application thereof. You have taken the word novation and adopted it. Take, therefore, the rules by which novation, for the sake of general utility, was originally held to be governed. Now, I mean to adhere to that, although I cannot legislate to the extent of saying that I will require a writing. But I will require evidence of an intention to make a new contract as plainly as if it were expressed in writing. I do not adopt the language of the statute in all cases to the extent of requiring a writing, because I can conceive a case of this kind which happened, I think, before Lord Cairns. A company, which was the assignee of another company, and had power to grant new contracts in lieu of the old, wrote to an old policyholder, offering him a new contract. The policyholder did not return any answer in writing to that, but he immediately went and paid his premiums to the company that made the offer. Lord Cairns held, and very justly, that that was to his mind an acceptance of the offer. And I think also with him that it was as plainly accepted by the thing done, as if the acceptance had been expressed in writing. Now there is no difference between us on the principle of law that governs these cases. Lord Cairns held it to be a question of novation, and that novation was a question of fact. I hold, also, that novation is a question of intention, and that an intention is a fact that must be proved. I will not admit of presumptions or inferences, as the media from which I will infer that intention, any more than Justinian did, when he referred to the uncertainty and difficulty that clouded the subject as long as it was possible to introduce those presumptions, and he superseded the presumptions by a plain and direct rule. Whenever therefore there is a transfer of business by one company to another, and a policyholder of the first company afterwards goes and pays the second company, the act is equivocal. He may pay the second company, regarding them as the assignees of the business of the first, and as authorised by the first to receive the premiums, or possibly, if the transferee company has power to grant him a new policy identical with the old, he may intend to pay the premiums to the new company with a view of standing in the same relation to them, that he previously stood in to the old company. But that intention must be proved; it cannot be inferred from the heading of the receipt. The obligation—the *onus probandi*—the duty of proving, lies on the company that alleges a novation. It is a question of intent to be evidenced in the clearest manner, and, unless that intent is evidenced, the simple payment of the premiums will be referred to the old contract, and the old rule which will be considered as still kept up by the assignee of the business, who by virtue of that transfer has a right to receive the premiums on old policies, as authorised by the company granting those policies. These are rules which, I think, tend to solve most of the questions that have been presented. But that would be hardly necessary in the case I have before me to decide, namely, *Blundell's case*, because in this case the materials for raising a novation are of the most evanescent character. Mr. Blundell originally contracted his policy with an agent of the British Commercial Company, a gentleman of the name of Mahoney, who had an office as agent of the British Commercial Company, at a place called Castlerea, in Ireland. After the union of the British Commercial Company with the British Nation Association, Mr. Mahoney kept on the same office without any alteration. After the union of the British Nation with the European he continued in the same office and apparently in the same character. Mr. Blundell knew no other person than Mr. Mahoney, he went to Mr. Mahoney originally, and he continued to go to Mr. Mahoney and to pay him until the end. There is nothing at all to ascribe to Mr. Blundell even a knowledge of the fact of the union of the companies, and, in point of fact, that he should have had such knowledge is entirely excluded by the case, for the case states as a fact that the claimant never received or had any notice whatever of either of the circular letters, which, on the occasion of the transfer to the British Nation were, it is said, sent to the policyholders, and on the occasion of the transfer of the British Nation to the European were also sent to the policyholders. Even the knowledge that might have been conveyed by those circulars was not possessed by Mr. Blundell, the present claimant. He went, therefore, and paid his premiums as before, and this highly technical mode of reasoning is resorted to for the purpose of imputing to Mr. Blundell, who knew nothing, constructive and implied knowledge. It is said that he took on the last occasion from Mr. Mahoney a receipt, which was in this form:—

European Assurance Society.

Policy No. 8779.

Received this 2nd day of April, 1867, the sum of nineteen

pounds and nine pence, being the payment of twelve months' premiums and interest from 27 March, 1867, for an assurance on the life of the Rev. R. Blundell effected by the before-named policy.

Now the "before-named policy" is the policy in the margin, numbered 8779, which was the original number of the policy when granted by the British Commercial Company. It is very true that that number may have been entered upon the receipt for the purpose only of denominating, indicating, and causing easy reference to the policy, the premium on which is represented to have been thus received. Well then, I was told in argument, this receipt is headed European Assurance Society, and it was the duty of this policyholder to have ascertained how the receipt got to be so entitled, and if he had inquired as he might, said the counsel, and ought to have inquired, he would have learnt that the European Society sprung from the British Nation Association, and he would have learnt that the British Nation Association was nothing in the world more than a company that absorbed and consolidated his original company, and then he would have arrived at the fact that he was dealing with the European Society, and was not dealing with any agent of his original company. Now I must entirely repudiate any notion of dealing with men on such principles. Men coming to deal with a plain contract shall be considered as understanding the contract to be what it purports to be, and I will not deprive them of this knowledge and impute to them this kind of constructive notice, to the annihilation of the original contract to which they trusted, unless it be proved to me that they knew perfectly with whom they were dealing, and unless it be proved to me that they did apply to the new company, as being the company that had absorbed their original contracting party, and the company that was able to grant them a new policy and to enter into a new contract, and that they paid the money with the intent and object that that new contract should be entered into. That is precisely what I find here. It is expressed in the Latin very well. Says Justinian, You shall prove to me *quod propter novationem prioris obligationis convenerunt.* You shall prove to me that they met together for the purpose of novating, of substituting for the former contract a new contract. Therefore, if you could show to me that when Mr. Blundell went to the old accustomed office of Mr. Mahoney, Mr. Mahoney told him: "Oh! Mr. Blundell, I have got a new character, I am no longer the agent of the British Commercial Company, but I am the agent of the European Society. Nay, I am a very Proteus, because there was another transformation, I was first an agent of the British Commercial Company, and then became the agent of the British Nation Association, and now I am the agent of the European Society; do you mean to enter into a new contract with the European Society?" Why, then, Mr. Blundell would have been aware of what he was about. Then the parties would have met *propter novationem;* and then if Mr. Blundell had said "Yes; I will adopt the European Society. I will pin myself on to the skirts of the European Society, and I pay you this money of mine in the capacity of their agent," that would have been a different thing. But there is nothing of the kind here. He went there believing that Mr. Mahoney was, as in fact he was, still an agent of the British Commercial Company. He was an agent of the British Commercial Company, because after the business of the British Commercial Company had been transferred to the British Nation Association, the British Nation Association continued him in the same capacity, and he was an agent still of the British Commercial Association because when the British Nation Association transferred their business to the European Society, the European Society continued him in the same capacity. Well then, if we find a case in which the parties have met for the purpose of making a novation, in which the company alleging a novation has a clear right to grant a new contract in the same terms as the original, and when it is clear that they offered to the policyholder to give him that new contract in lieu of the old one, when it is clear also that upon that offer being so made the policyholder, with a knowledge of the facts, paid his money *eo intuitu,* that it might be received by virtue and on the footing of the new contract, and not of the old, then there can be novation. Men's dealings will rest on a basis of certainty if we exclude presumptions and implications and constructive information, and allow them to have their rights regulated by what they believed and what they knew and what they had a right to adhere to, until they voluntarily relinquished that right and accepted in lieu of it something else. Now, rightly or wrongly, I have clearly stated to you the plain common-sense principles, which are not only common sense, but are warranted by the highest considerations of law, by which I shall guide myself in questions of this kind under this arbitration. I may observe, by the way, although it is a little pedantic to notice it, that it is a very incorrect use of the word novation. The civil law tells you that the word ought to be delegation, which is a particular species of novation, and in that sense the British Commercial Company would be the delegating company, the delegated company would be the British Nation Association or the European Society, the term implying that the company originally contracting delegates to its creditor, that is offers to delegate to him, another contracting party, and in those cases it is laid down in the Pandects that you must have the clearest proof of the concurrence, complete knowledge, and mutual consent of all parties, both the company that delegates, the company that is delegated, and the creditor who accepts the delegated company in lieu of the original company. I say, therefore, that these principles are warranted by common sense, and that they are justified by the highest authority. There is no difference between myself as to the mode in which I view these cases in principle, and former judges; but I have the advantage of reviewing them by the light thrown upon them by the enactment to which I have referred (35 & 36 Vict. c. 41), and I have the advantage of being able to trace that enactment to its source in the civil law from which all this doctrine was derived, and I guide myself by the rules that were then established for the express purpose of excluding those difficulties and uncertainties which were found to arise when proceeding upon presumptuous and imputed knowledge and inferences of intention, instead of adhering to the rule that the intention must be proved and manifested in the most definite manner. In the case of Mr. Blundell, I hold that there is no ground whatever for imputing to him an acceptance of the

European Society in discharge of the British Commercial Company, and I hold him, therefore, to be a policyholder of the British Commercial Company, and entitled to all his rights as such.

Costs of the applicant allowed out of the assets of the British Commercial Company.

Solicitors for the applicant, *Baxter, Rose,* and *Norton.*

Solicitors for the official liquidator of the British Commercial Company, *Mercer* and *Mercer.*

Saturday, Nov. 2, 1872.

ROYAL NAVAL AND MILITARY SOCIETY'S CASE.

Life assurance company—Amalgamation of companies—Winding-up—Deed of settlement—Amalgamation deeds—Interpretation of deeds—Trust fund.—Property transferred, on an amalgamation, by one insurance company to another, not impressed with a trust in favour of policy holders of transferor company.

The deed of settlement of the R. Life Assurance Company contained provisions, whereby the directors might, on the dissolution of the company, obtain from some other company an undertaking to pay all the policies, &c., of the R. Company, and might transfer to such other company so much of the property of the dissolving company as should be agreed upon as sufficient, with the future premiums, to enable the company from which the undertaking might be obtained to comply therewith.

The company was dissolved in accordance with these provisions, and part of its assets was transferred to the E. Society, which entered into the required undertaking.

In the subsequent winding-up of the two companies it was contended by the R. Company that the funds transferred were impressed with a trust in favour of the policyholders of the R. Company, but it was

Held that the funds were merged in, and formed part of the general assets of the E. Society.

The R. Company's deed of settlement was interpreted not to impose such a trust, and upon the interpretation given to the deeds of assignment and amalgamation, the funds were to belong to the E. Society absolutely in consideration of their covenant to pay the policies, &c., of the R. Company.

THIS was a question as to whether the assets of the Royal Naval and Military and East India Company Life Assurance Society, which had been transferred to the European Society in 1866, were impressed with a trust in favour of the then existing policyholders of the Royal Naval and Military Society, &c.

This society was established under a deed of settlement, dated the 1st January 1839, which contained the following provisions for the dissolution of the company:

Clause 172:

That it shall be lawful for an extraordinary court of directors, specially called for the purpose, to enter into a resolution recommending the dissolution of the company, and upon such dissolution being so recommended, the same extraordinary court of directors shall call an extraordinary general court for the purpose of taking into consideration the propriety of dissolving the company, and if at such extraordinary general court a resolution shall be entered into for dissolving the company, then the court of directors shall call a second extraordinary general court for the purpose of confirming or rejecting such resolution for dissolving, and such second extraordinary general court shall be holden within the space of fifty days after the resolution for dissolving shall have been entered into at the first extraordinary general court; and if such resolution for dissolving shall be confirmed at such second extraordinary general court, then from the time of such confirmation the company shall be dissolved and the business thereof shall be concluded.

Clause 173:

That immediately upon the dissolution of the company the court of directors shall, out of the funds or property of the company, pay and satisfy all immediate claims and demands on the company arising from assurances, annuities, or other contracts or engagements, and shall (but subject and without prejudice to the provision hereinafter contained) obtain from the directors or managers of some other assurance company or society an undertaking to pay and satisfy all or any such as the court of directors may think proper of the remainder of the claims and demands on the company arising from assurances, annuities, or other contracts or engagements, when and as the times for the payment and satisfaction of the same shall respectively arrive, and shall cause to be transferred to some of the trustees of such other assurance company or society so much of the funds or property of the company as shall be agreed upon between the contracting parties as sufficient, with the premiums that may become payable in respect of all or any of the existing policies, to enable the company or society from whose directors or managers the undertaking shall have been obtained, to comply therewith, and shall make such arrangements with the said directors or managers with regard to the said undertaking as the court of directors shall in their discretion think fit, and shall cause to be done and executed all such acts, deeds and things as in the opinion of the court of directors shall be necessary or advisable for carrying the said arrangement into effect. Provided nevertheless that the court of directors shall be at liberty to continue, for such period as they may think fit, the business of the company so far as regards all or any of the remainder of the claims and demands on the company arising from assurances, annuities, or other contracts, and the receipt of premiums, and the benefits of any contract with the company, and to make and carry out such arrangements with bankers and others for managing the business so continued as to the said court shall seem fit, and to invest such bankers and others with all proper powers in regard to the matters and things committed to their charge or management, and from time to time to vary or rescind any such arrangements, and to revoke, or vary, or enlarge any such powers, and after every or any such rescinding or variations, to act in the matter according to the original powers intended to be hereby conferred on the said court, and to make such allowances, by way of recompense for their care and trouble, to such banker and others respectively, as the said court shall think proper, and likewise upon the discontinuance of the business in regard to any of the remainder of the said claims and demands, premiums and benefits, to act in relation thereto, and the policies and contracts from which such premiums and benefits respectively shall result, in the manner first authorised by this clause, and if any funds or property of the company shall remain, after answering the several purposes aforesaid, the court of directors shall cause the same, or so much thereof as shall not consist of money, to be sold, got in, or otherwise converted into money, and shall cause the moneys arising from the said remaining funds or property, or of which the same shall consist, to be paid and distributed, at such time or times as they shall think fit, to and amongst the proprietors and other holders of shares in the capital of the company, according to their respective rights and interests therein; and notwithstanding the dissolution of the company, these presents and the provisions herein contained, and all powers, privileges, rights, and duties of the proprietors and other holders of shares, including the powers to call and hold extraordinary general courts, and to call for and enforce the payment of further instalments on shares, shall, until all claims and demands shall have been respectively satisfied, and provided for as aforesaid, and until a final division shall have been made of the residue, if any, of such moneys as aforesaid, remain and continue

in full force so far as the same may be necessary for winding-up the concerns of the company, and for enabling the court of directors to dispose of the funds and property of the company, and to satisfy and provide for such claims and demands, and to make such payments and disbursements as aforesaid.

In 1866 arrangements were made for the transfer of the business of the Royal Naval and Military Society to the European Society. These were carried into effect by two deeds, one called a deed of assignment and the other a deed of amalgamation, both dated the 17th Sept. 1866.

The deed of assignment recited (*inter alia*) the 172nd and 173rd clauses of the Royal Naval and Military Company's deed of settlement, and a provisional agreement for an amalgamation under these clauses, whereby it was agreed (*inter alia*)

1. That in the event of and subject to the Royal Naval and Military Society being dissolved, under and according to the Royal Naval and Military Society's deed of settlement, within three calendar months from the date of the said provisional agreement, and subject to the said agreement being confirmed by the extraordinary general courts of the Royal Naval and Military Society, required to sanction such dissolution, the European Society should by deed adopt and take over in an effectually binding way, and undertake to pay and satisfy, in conformity with the terms of the deed of settlement of the Royal Naval and Military Society, all the liabilities on life and annuity policies granted by the Royal Naval and Military Society, and on foot, or which, having then become claims, remained unsatisfied on the 6th Aug. then instant, and all other debts, liabilities, claims, or demands either due from or current against the Royal Naval and Military Society, as at and from that date, and including the capital paid up by the shareholders of the Royal Naval and Military Society.

. . . . . .

3. That the presumed realisable value of the property and assets of the Royal Naval and Military Society should be taken at the agreed sum of 98,060*l.* 7*s.* 3*d.*, of which 83,951*l.* 7*s.* 3*d.* should be taken as the agreed and sufficient proportion, together with the premiums to become payable on the existing policies of the Royal Naval and Military Society, to enable the European Society to pay and satisfy the aforesaid liabilities, debts, and engagements of the Royal Naval and Military Society, and such proportion of the said property and assets should, in consideration of and subject to the European Society so taking to and undertaking to pay and satisfy such liabilities, debts, and engagements, be transferred to the trustees of the European Society, or some of them, or otherwise be held in trust for that society.

The deed further recited the deed of amalgamation of even date, and also that the portion of the property and assets of the Royal Naval and Military Society, that was referred to in the 3rd clause of the provisional agreement as representing 83,951*l.* 7*s.* 3*d.*, was set forth in the first part of the schedule thereto; and then the deed witnessed—

That in pursuance of the hereinbefore recited provisional agreement, and for further and fully effectuating the same on the part of the said Royal Naval and Military Society, and of the directors thereof, and in pursuance also of the agreement in this behalf hereinbefore mentioned, and in consideration of the premises, and particularly in consideration of the execution of the hereinbefore recited deed of even date herewith by the said European Society, and the directors thereof, the directors of the said Royal Naval and Military society hereinbefore named as parties hereto of the first part, with the concurrence of the directors hereinbefore named as parties hereto of the third part,

[*being the Directors of the European Society*]

do hereby assign to the said European Assurance Society, and their successors and assigns all the benefits and advantages of the business which until the dissolution hereinbefore mentioned of the said Royal Naval and Military Society was carried on as aforesaid by the same society, so far as the same are continuing and capable of being transferred, and all books, documents and other papers and writings used in or relating to the same business or the concerns thereof belonging to or in the custody of the said directors at the time of such dissolution, and also all such of the assets of the said Royal Naval and Military Society comprised or specified in the first part of the said schedule hereto as have not been already or shall not be vested in the said European Assurance Society, or in trustees for the said society by the means or in the manner hereinbefore recited; and all the estate, right, title, interest, claims, and demand of or by the directors of the said Royal Naval and Military Society, or of the proprietors thereof, and which they the said directors can bind of and in all the premises hereinbefore expressed to be assigned (except such assets as were expended or applied by the same directors in paying or discharging as aforesaid such of the liabilities as were paid or discharged by them since the execution of the hereinbefore recited provisional agreement, and except the paid up capital of the same society.) To have and to hold the said premises hereinbefore expressed, to be assigned unto the European Assurance Society, their successors and assigns, absolutely and for their own use.

The deed of amalgamation, after reciting (*inter alia*) the deed of assignment of even date and a provisional agreement for amalgamation, witnessed

That in pursuance of and for effectuating the hereinbefore recited provisional agreement, and the clauses or stipulations thereof, so far as the same are to be performed or carried into effect by the said European Society and the directors thereof, and in pursuance of the agreement lastly hereinbefore recited, and in consideration of the premises, and in particular in consideration of the said assets of the said Royal Naval and Military Society, comprised in the first part of the said schedule to the hereinbefore recited indenture of even date herewith, and amounting as aforesaid to 83,951*l.* 17*s.* 3*d.*, having been, except as aforesaid, so transferred, or made over, or intended to be transferred or made over as aforesaid, to the said European Society or the trustees thereof, they, the said European Society, for themselves, their successors and assigns, with the privity and consent of the directors of the said society, parties hereto of the second part, and they, the same directors (so as effectually to bind the same company and the property, and assets thereof, but not so as to undertake hereby any personal responsibility, further or otherwise), do respectively grant to and covenant with the said trustees of the said Royal Naval and Military Society, parties hereto of the third part, their executors, administrators, and assigns, that the said European Society, their successors and assigns, and the property and assets of the same company, including the assets and property of the said Royal Naval and Military Society, assigned or to be assigned as aforesaid, as part thereof, shall undertake and be bound by, and pay and satisfy all the liabilities on life or annuity policies, granted by the said Royal Naval and Military Society, and on foot on the 6th day of August in the year of our Lord 1866, or which, having then become claims, remained unsatisfied on the same 6th day of August, and all other debts, liabilities, claims, and demands, whatsoever, present or future, of, upon, or against, the said Royal Naval and Military Society, or the trustees, directors, or proprietors thereof, except so far as the said policy liabilities, and other debts, liabilities, claims, or demands have, since the date of the hereinbefore recited provisional agreement, been paid or discharged by the directors of the said Royal Naval and Military Society as aforesaid, from or out of the assets of the said Royal Naval and Military Society, comprised in the first part of the said schedule to the hereinbefore recited indenture of even date herewith. And also that the said European Society, their successors and assigns, shall and will, from and out of the property and assets of the said European Society, inclusively of the said assets of the said Royal Naval and Military Society lastly mentioned, as part thereof (except as aforesaid) save harmless and

indemnify, and keep indemnified, the trustees, directors, and proprietors of the said Royal Naval and Military Society and every of them and their respective heirs, executors, and administrators, and their respective estates and effects, from and against all the said liabilities on life or annuity policies, and other debts, liabilities, claims or demands respectively, lastly hereinbefore mentioned; and from and against all claims and demands, actions, suits, controversies, losses, damages, costs, and expenses in anywise relating to the same liabilities, and other debts, liabilities, claims, or demands respectively, or for or on account of any default, neglect, or omission to discharge or meet the same duly according to law, or any default on account of in respect thereof.

Some portions of the assets so transferred still existed *in specie*, but others did not.

In the winding-up the trustees of the Royal Naval and Military Society submitted it for the consideration of the arbitrator, whether the assets so transferred were held by the European Society upon trust for the policyholders of the Royal Naval and Military Society, or whether after the transfer they became merged in and formed part of the general assets of the European Society.

Waller appeared for the trustees of the Royal Naval and Military Society, and contended that the society's deed of settlement imposed a trust upon any assets that might be transferred in favour of that society's policyholders, and that, if that were not so, it was the intention of the deeds of amalgamation and assignment to create a trust.

[Lord WESTBURY.—If it had been intended to reserve the trust in favour of the creditors over the property handed over to the European Society, the parties would have taken care that that property should be kept apart, should be vested in the names of trustees, and should preserve its identity as property of the Royal Naval and Military Society, to be applied, *pro re nata*, whenever the claims of creditors should arise. There is no provision for keeping this 83,951*l.* 7*s.* 3*d.* in the names of trustees, apart from the property of the European Society.]

Montague Cookson (with him *Napier Higgins*, Q.C.) appeared for the official liquidators of the European society, but was not called on.

Lord WESTBURY.—

This case has been very properly brought forward, for it would have been quite impossible to have proceeded with this liquidation with this claim outstanding—until the question of the validity of the claim, which would have abstracted a considerable portion of assets, had been decided. It has, therefore, been brought forward by the trustees of the Royal Naval and Military Society in a very proper manner. But the nature of the case, although it is rather a singular one, does not seem to me to admit of any reasonable doubt being entertained. By the deed of settlement of the Royal Naval and Military Society, provision was made for the keeping in hand the property of the company. Then by the 172nd section the dissolution of the company is provided for. By the 173rd section the question of what was to be done in the event of that dissolution is taken up. And first of all the trustees are directed out of the accumulated property of the Royal Naval and Military Society to pay all those debts which admitted of present payment. There would naturally be with an insurance company a great number of debts that did not admit of present payment: there would be contingent liabilities that might or might not ripen into debts. There would be a number of engagements that were *solvenda in futuro*; therefore with regard to them no present immediate action could be taken for the purpose of releasing the society and the shareholders of the society. Well, then, a very prudent step is next taken in the deed, and it is this: The trustees of the Royal Naval and Military Society are authorised, with regard to this portion of its liabilities, to contract with another company that such other company will take on its shoulders these liabilities, and will indemnify the shareholders of the Royal Naval and Military Society from these liabilities whenever they shall arise. But then it was felt that of course the assets of the company remaining after the payment of the present debts would represent a fund out of which these future liabilities would have to be paid, if there were no amalgamation with another company, and therefore it is provided by the 173rd section, that such portion of the assets of the Royal Naval and Military Society remaining after payment of present debts as would, in the opinion of its own trustees, and the trustees of the directors of any company with whom it contracted, be enough to enable that company to be sure of paying the creditors, that that should be abstracted from the whole body of the remaining assets, and should be handed over to the company. And the question that arises is this: did they intend, or can it be fairly imputed to them, having regard to the words used, that the portion of the assets so abstracted from the general mass was still to be kept apart as a separate fund by the directors of the company to whom it should be handed over? Or was it intended that it should be regarded as a consideration by such recipient company for the covenant that they entered into to indemnify? A very little more, or a very little less than what we have, might probably have furnished sufficient ground for that contention, but it cannot be maintained consistently with the express words that we have here, first of all, in the 173rd clause, it is distinctly said, that they "shall cause to be transferred to some of the trustees of such other assurance company so much of the funds or property of the Royal Naval and Military Society as shall be agreed upon between the contracting parties as sufficient with the premiums that may become payable in respect of all or any of the existing policies, to enable the company to comply therewith." There is nothing at all approaching to the continuance of a trust, or declaration of a trust, in the recipient company—I mean by recipient company, the company that was to receive from the Royal Naval and Military Society this agreed on amount of funds. They are to receive it absolutely. They may throw it into their assets. It is an augmentation of their means, and it is in order that they may be strengthened in their solvency and in their property, and therefore the better able to comply with the undertaking to indemnify, which is the consideration to be given by them for the acquisition of this additional property. Then, as if to render the matter clear beyond the possibility of doubt, the next deed that we have is the deed of assignment, and after distinguishing the amount of the property which was to be regarded as the consideration for the indemnity and stating its

value, and showing how parts of the assets had been disposed of for the benefit of the European; the entire remaining assets of the Royal Naval and Military Society are expressly assigned and transferred, by the Royal Naval and Military Society to the European to hold to the European "absolutely and for their own use," words which utterly exclude the notion of any trust being intended, and utterly exclude the notion of that which might be short of a trust, the obligation to keep the property so transferred apart, separate, and intact, to answer from time to time the demands in respect of the future debts of the Royal Naval and Military Society. Both hypotheses, both contentions, are utterly excluded by those words. And no words could have been chosen more apt and more effective to express the thing intended, namely, that the property which was the estimate of the amount of future liability, was to become immediately the absolute property of the European Society. We come next to the deed of amalgamation, and an argument has been attempted to be founded on the covenant to indemnify contained in that deed. Whenever parties who enter into a covenant intend to exclude the personal liability, but to admit the liability only to the extent of the property, that is expressed in the introductory words, and here the covenantor does not intend that he shall be personally answerable, but that he shall be answerable only to the extent of the property of the company, and, as if to exclude the possibility of the implication contended for, the property transferred to the European by the deed of assignment is referred to and specified as being part of the property of the European, and to the extent of that as well as to the extent of the other property of the European the covenant extends. Now I do not think that the trustees of the Royal Naval and Military Society would have done right to permit this to pass *sub silentio*, without taking the opinion of the court. They have done it in the most convenient form, and in the least expensive way. I decide against them, but as they have brought it forward in a manner which saves the European Society from a great deal of trouble, I think it right, although I declare contrary to their application, to give them the costs of the application out of the assets of the European Society. That will be in effect out of the fund.

Solicitors for the trustees of the Royal Naval and Military Company, *Garrard* and *James*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

Oct. 22; *Nov.* 1, 2, *and* 5, 1872.

WALLBERG'S CASE; MARCUS'S CASE; SULLIVAN'S AND SMYTHE'S CASES; TRUSTRAM'S CASE.

Life Assurance Company—Winding-up—Policy—Annuity contract—Amount of proof—Principles on which claims are to be estimated—Date of valuation of policy—Interest on unpaid annuities—Claim by policyholder to have certain premiums paid back to him.

In the winding-up of the European Society and the companies amalgamated therewith, the method adopted for estimating the amount of proof on policies and annuity contracts was that established by the Life Assurance Companies Act 1872 *for future windings-up, namely, "An annuity shall be valued according to the tables used by the company which granted such annuity at the time of granting the same, and where such tables cannot be ascertained or adopted to the satisfaction of the court then acccording to the table known as the Government Annuities Experience Table, interest being reckoned at the rate of four per cent. per annum. The value of a policy is to be the difference between the present value of the reversion in the sum assured on the decease of the life, including any bonus or addition thereto made before the commencement of the winding-up and the present value of the future annual premiums. In calculating such present values the rate of interest is to be assumed as being four per cent. per annum, and the rate of mortality as that of the tables known as the Seventeen Offices Experience Tables. The premium to be calculated is to be such premium as, according to the said rate of interest and rate of mortality, is sufficient to provide for the risk incurred by the office in issuing the policy, exclusive of any addition thereto for office expenses and other charges."*

The Life Assurance Companies Act 1872, *was interpreted to mean that the time at which the valuation is to be made is the date of the order to wind-up.*

Where any premium became due and the thirty days of grace also expired before the date of the petition to wind-up, but the premium was not paid by the policyholder, the policy was void; where the premium became due before the presentation of the petition but the thirty days of grace did not expire until after that date, and also where the premium became due at any time during the period of insolvency between the presentation of the petition to wind-up and the winding-up order, whether the thirty days of grace expired before or after the winding-up order, in every such case the policy holder, who had not paid such premium, was to have the option of paying it on presenting his policy for valuation. In order to prove on a policy, all premiums that became due before the winding-up order were to be paid to the official liquidators; the amount of the valuation of the policy could not be set-off against unpaid premiums.

During the seven months' interval beween the presentation of the petition to wind-up and the winding-up order, the Court of Chancery had made an order "that all premiums on policies to be received by the society be carried to a Suspense Account until further order," and a second order that the premiums might be paid "to a separate account to be entitled, 'The Renewal Premium Account,' upon the condition that the respective persons paying such renewal premiums may (provided an order be made for winding-up the company) have such premiums returned in full." Those who paid their premiums in accordance with either of these orders were now held to be entitled to receive them back, provided they abandoned their claims on their policies; but if they brought in their claim, such premiums were not to be repaid to them.

During the same interval an order was made by the Court of Chancery that the society might continue to pay all annuities not exceeding 50*l.*, *and yearly sums not exceeding* 50*l. on account of annuities*

exceeding that amount. It was now held that these sums were to be retained by the annuitants, and a deduction made from the amount of their proof.

Where an instalment on an annuity became due before the presentation of the petition to wind-up and was not paid, the annuitant was entitled to prove for that instalment, together with interest from the day of payment down to the presentation of the petition. Where the instalment became due after the presentation of the petition, and was not paid, the proof was to be for the instalment without interest.

Wallberg's case and *Marcus's* case involved the question as to the time at which the valuation of a policy is to be estimated in the winding-up of an insurance company; and also a question as to the repayment of premiums which had been paid by policy holders in accordance with orders of the Court of Chancery.

The successful petition to wind-up the European Society was presented on the 10th June 1871, and the order to wind-up was made on the 12th Jan. 1872. In the interval certain orders were made by Vice-Chancellor Malins, in the proceedings on this petition, and on another petition to wind-up that was presented subsequently. The following was an order of the 25th July 1871:

The court being of opinion that it has been proved that the European Society is insolvent, and the European Society by their counsel applying that the further hearing of the said petitions may stand over for the purpose of seeing whether an arrangement can be made under the 22nd section of the Life Assurance Companies Act 1870 or otherwise, this court doth order that the further hearing of the said petitions do stand over until the first petition day in Michaelmas Term 1871. And it is ordered that all actions, suits, and other proceedings against the said society, including the action commenced by the said Benjamin Mallinson, be stayed until further order, and it is ordered that the said society be at liberty, until further order, to continue the payment of rent, taxes, clerks' salaries, servants' wages, and all other office expenses, and of the reasonable expenses of the committee appointed at the meeting of policyholders and shareholders held on the 20th July 1871, at the head office of the said society, and it is ordered that the said society be at liberty until further order *to continue to pay all annuities not exceeding 50l., and in the discretion of the said society yearly sums not exceeding 50l. on account of annuities*, exceeding that amount, such payments to annuitants to be taken into account in adjusting any claim they may have against the said society. And it is ordered that *all premiums on policies to be received by the said society be carried to a suspense account until further order.* Any of the parties are to be at liberty to apply as there may be occasion.

The following notice was then issued to the policyholders:

NOTICE.

It is particularly requested that the premium mentioned in the annexed notice be remitted within the days of grace direct to the chief office, No. 17, Waterloo-place, Pall Mall, London, S.W. No deduction of any kind whatever will be allowed. The premium will be carried to a suspense account, pursuant to an order of Vice-Chancellor Sir Richard Malins, made on the 25th July 1871, in the matter of two petitions against the society now pending before him, until such Vice-Chancellor may make a further order in relation thereto.

On the 17th Nov. 1871 the following order was made:

That the said petitions do respectively stand over till the first petition day of Hilary Term next, with liberty for any parties to apply to have them or either of them restored at an earlier day; and in the mean time it is ordered that C. J. Bunyon, W. P. Pattison, and S. P. Low be appointed provisional official liquidators of the said European Assurance Society. . . . And it is ordered that the powers of the said provisional official liquidators be limited and restricted to the following acts, that is to say, to call meetings of the policy holders of the said company to consider any arrangements or arrangement which have or may be proposed for their benefit or the benefit of the said company, and to give such notices as may be necessary to enable any application to be made to Parliament in the next session with reference to the affairs of the said company, if the court shall hereafter think fit to authorise such to be given, and to apply to the judge in chambers as to the appointment of a chairman of any meetings of the said company. And it is ordered that any premiums that may be received on any policy of assurance of the said company be continued to be carried to a separate account, and that the said provisional official liquidators are to continue to carry on the business of the said company so far as is necessary for keeping together the business of the said company, and to collect and get in all outstanding assets of the company. . . .

On the 7th Dec. 1871, a further order was made:

That the said provisional official liquidators, or the official liquidators of the above-named society, if and when appointed, be at liberty, until further order, to receive from all persons assured with the above-named society, the renewal premiums which may become due on the policies of the said society, and to carry the same to a separate account, to be entitled "The Renewal Premium Account," *upon the term or condition that the respective persons paying such renewal premiums may (provided an order be made for the winding-up of the said society), have such premiums returned in full.* And it is ordered that the said provisional official liquidators be at liberty forthwith to issue notices to holders of policies in the said society that the renewal premiums thereon will be received upon or subject to such condition.

In accordance with the provisions of this order the provisional official liquidators issued the following notice to the policyholders:

European Assurance Society.

Sir,—We beg leave to acquaint you that the yearly premium on the undermentioned policy on the life of yourself will become due on the day of , and to keep the policy in force the said premium must be paid within thirty days from that date at the chief offices, 17, Waterloo-place, Pall-mall, London. . . . It is particularly requested that the premium mentioned in this notice be remitted within the days of grace direct to the chief office. . . . The premium will be carried to a suspense account, pursuant to an order of Vice-Chancellor Sir Richard Malins made on the 25th July 1871, and continued by an order dated 17th Nov. 1871 in the matter of two petitions against the society now pending before him, until such Vice-Chancellor may make a further order in relation thereto.

C. J. BUNYON,
W. P. PATTISON,
S. P. LOW,
} Provisional Liquidators.

N.B.—Premiums cannot be received after the expiration of the days of grace without the production of satisfactory evidence of health and the usual fine.

Mr. Wallberg's half-yearly premiums on two policies became due on the 11th Sept. 1871, and he paid one on the 16th Sept. 1871, and the other on the 19th Sept. 1871, to the "suspense account," in accordance with the Vice-Chancellor's order of the 25th July 1871, and received receipts in the following form:—

European Assurance Society.

Premium £4 7s. 6d. on the life of W. W. Wallberg.

Received, the 16th day of Sept., 1871, the sum above stated, being the amount of premium payable to this society for the renewal of policy No. 5836. for six months, from the 11th Sept. 1871, according to the tenor of the said policy, such sum to be carried to a suspense account, pursuant to an order of Malins, V.C. made on the 25th July 1871, in the matter of two petitions

against the society now pending before him, until such Vice-Chancellor may make a further order in relation thereto.

W. W. T. SMITH } Directors.
R. READ }

Mr. Marcus's half-yearly premium on a policy became due on the 26th Nov. 1871, and was paid on the 21st Dec. 1871. The following was the receipt given:—

European Assurance Society.

Premium £17 18s., on the life of J. Marcus.

Received, the 21st day of Dec. 1871, the sum above stated, being the amount of premium payable to this society for the renewal of policy No. 6094, for twelve months, from the 26th Nov. 1871, according to the tenor of the said policy, such sum to be carried to a suspense account pursuant to an order of Malins, V. C., made on the 25th July 1871, and continued by order dated 17th Nov. 1871, in the matter of two petitions against the society now pending before him, until such Vice-Chancellor may make a further order in relation thereto.

For self and Co-provisional Liquidators,
W. P. PATTISON.

Subsequently an order was made by the Vice-Chancellor that some of the premiums paid under these order should be repaid to the policy holders. On the 19th Aug. 1872, an order was made by the arbitrator suspending the repayment of premiums.

It was now contended on behalf of Messrs. Wallberg and Marcus, that the date of estimating the value of the policies was the date of the petition to wind-up, and that the premiums paid after that date ought to be returned to them in full; and that, if the date of the winding-up order were taken as the date of estimating the value of the policies, then the premiums, so paid after the presentation of the petition to wind-up, ought, under the orders of the Vice-Chancellor, to be returned or to be set-off against their dividends and not against their proof on their policies.

Southgate, Q.C. and *Romer* for the applicants, contended that the date of estimating the value of the policies is the date of the presentation of the petition to wind-up, and consequently the premiums that accrued due after that date need not have been paid. In *Lancaster's case* (Albert Arbitration, 16 S. J., 103) there was no intention to discriminate between the date of the petition and the date of the winding-up order, for in the case of the Albert Company the order was made within a very short time after the presentation of the petition. What was meant to be decided in *Lancaster's* case was the question as to the mode of making the valuation. Moreover, under the 84th section of the Companies Act 1862, the winding-up is to be deemed to commence at the time of the presentation of the petition; and in the Life Assurance Companies Act 1872, (*a*) which establishes the method of valuation for future windings-up the date for making the valuation is not fixed expressly, but it may be inferred that the Act points rather to the date of the presentation of the petition. This was clearly the date taken by Vice-Chancellor James in *Re Albert Life Assurance Company, Cook's case* (L. Rep. 9 Eq. 703). The same conclusion may also be inferred from *Re Trent and Humber Company, Ex parte Cambrian Steam Packet Company* (L. Rep. 4 Ch. 112). [Lord WESTBURY.—Independently of *Cook's* case, are there any arguments, any principles, any analogous things, that you can cite in support of your contention?] It has been decided at law that where one party to a contract has intimated an intention not to perform it, you may sue for breach of the contract without waiting till an actual breach has taken place: (*Danube and Black Sea Railway, &c., Company* v. *Xenos*, 11 C. B., N. S., 152; 13 C. B., N. S., 825). That is analogous to the question that arises in this case. [Lord WESTBURY.—All that is quite clear; that when one party has to do something for the benefit of another, and the other says, "I dispense with that, for I do not mean to perform the contract," he is under no obligation to fulfil that condition.] And you need not wait till there is an actual breach. [Lord WESTBURY.—I am glad to find the courts of law adopting such an equitable principle. That has long been known and settled. The difficulty I have here is, the obligation of an individual to pay the premium before he can present the policy as a current valid contract.] Some of the payments were made under a distinct contract that the premiums were to be returned, and surely these promises of the Court of Chancery will be abided by. [Lord WESTBURY.—All these orders are very painful to me, because they have been productive of an immense amount of expense to the company. And why a thing was ordered to be paid one day, and ordered to be repaid another, I am unable to divine, unless it be that there was uncertainty of purpose in the mind of the court as to the time when the valuation was to be made. If the time of valuation is the date of the presentation of the petition, then the orders are accounted for, but if the time of the valuation is the date of the winding-up order, then these orders are wholly immaterial.]

Napier Higgins, Q.C. and *Montague Cookson* appeared for the official liquidators of the European Society, but were not called on.

(*a*) 35 & 36 Vict. c. 41 s. 5.—Where a life assurance company is being wound-up by the court, or subject to the supervision of the court, or voluntarily, the value of every life annuity and life policy requiring to be valued in such winding-up, shall be estimated in manner provided by the first schedule to this Act, but this section shall not apply to any company the winding-up of which has commenced before the passing of this Act, unless the court, having cognisance of the winding-up, so order, which order that court is hereby empowered to make, if it think it expedient so to do, on the application of any person interested in the winding-up of such company.

FIRST SCHEDULE.

Rule for valuing an annuity.—An annuity shall be valued according to the tables used by the company which granted such annuity at the time of granting the same, and where such tables cannot be ascertained or adopted to the satisfaction of the court, then according to the table known as the Government Annuities Experience Table, interest being reckoned at the rate of our per cent. per annum.

Rule for valuing a policy.—The value of a policy is to be the difference between the present value of the reversion in the sum assured on the decease of the life, including any bonus or addition thereto made before the commencement of the winding-up, and the present value of the future annual premiums. In calculating such present values, the rate of interest is to be assumed as being four per cent. per annum, and the rate of mortality as that of the tables known as the Seventeen Offices Experience Tables. The premium to be calculated is to be such premium as according to the said rate of interest and rate of mortality, is sufficient to provide for the risk incurred by the office in issuing the policy, exclusive of any addition thereto for office expenses and other charges.

Lord WESTBURY.—I will not have any answer in this case at the present moment, but if there is any other policy holder who wishes to be heard on the points so ably argued by Mr. Southgate, I should like to have an opportunity of hearing him before I finally decide the question. I should not like to decide a question of this great magnitude upon any single argument, however able it is, and therefore, if there is any other policy holder, any individual, or two or three conjointly, who desire to be heard on the point, if he or they will communicate with Messrs. Mercer, an opportunity of a further argument shall be given before I decide the question.

Judgment was accordingly reserved.

Friday, Nov. 1, 1872.

TRUSTRAM'S CASE.

IN this case it was declared by Lord Westbury that in all cases in which premiums had become due, according to the terms of the policy, before the date of the presentation of the petition, but where the thirty days of grace allowed for payment thereof did not expire until after the date of the presentation, the policyholders should be at liberty in the winding-up to pay or satisfy those premiums before proof.

In addition to his ordinary policies Mr. Trustram had two policies, each assuring him 150*l.* a year, or with regard to one policy 1678*l.* 6*s.* 3*d.*, according to his option, in case he should, during the currency of the policy, suffer from permanent incapacity through paralysis, blindness, insanity, accident, or otherwise be prevented from following the duties of his ordinary profession. The order to wind-up the European Society having been made on the 12th Jan. 1872, a claim was sent in on these policies on the 10th April 1872, Mr. Trustram died on the 25th June 1872. His representatives now claimed that, inasmuch as at the date of the winding-up order a larger premium must have been paid to any other company for a similar policy on the assured, who was then of advanced age, they were entitled to bring in a claim on the policies, and that, notwithstanding the death of the assured.

Graham Hastings for the applicant.

[Lord WESTBURY.—Suppose there is a policy assuring 500*l.* to a man if he has the gout; he sends in his claim in April 1872 for the value of the policy, but before anything can be done he dies without ever having had the gout. Is there anything in that case to value? In estimating the policies, what are we to do with such a policy as this, a policy against disease? It does not come within any tables. There is no other company that carries on such a wild business.]

The principle of estimating the value of these policies was not laid down. The policyholders will bring them in for valuation, and their value will then be determined.

Saturday, Nov. 2, 1872.

SULLIVAN'S AND SMYTHE'S CASES.

IN these cases the question arose as to the method of valuing the annuity contracts granted by the insolvent assurance companies. There were also further questions as to interest on certain instalments of annuities which became due before the winding-up order, and as to other instalments of amounts under 50*l.*, some of which in the interval between the petition to wind-up and the winding-up order, had been paid to the annuitants under the order of Vice-Chancellor Malins, dated 25th July 1871.

J. W. Chitty appeared for the applicants, and in claiming interest on the instalments of annuities that became due before the winding-up order, referred to

Watts's and Woodcock's case, Albert Arbitration, 16 S. J. 517.

Montague Cookson appeared for the official liquidators of the European Society.

Lord WESTBURY.—Mr. Chitty, what I decide in your favour is this, that as to the instalment of your annuity that became due before the presentation of the petition, you will be entitled to prove that, with interest from the day of payment down to the presentation of the petition. You will be entitled to add that amount of interest to the proof of the amount of the instalment. Secondly, I decide, as to the instalments that became due after the presentation of the petition, but before the date of the order to wind-up, that you will be entitled to prove the amount of that instalment, or those instalments, but without any interest thereon. Thirdly, I decide in your favour that your annuities are to be valued as at the date of the order to wind-up, and that you will be entitled to prove for the amount of the valuation. Then as to the payment made between the date of the presentation of the petition and the making of the order to wind-up, you will keep that sum of money in your pocket and give credit for it, as against the instalments of the annuity that become due before the date of the order to wind-up.

WALLBERG'S CASE.

Nov. 2.—*Romer* now made an application in this case, which stood for judgment, that, if it were held that the date of the winding-up order was to be taken as the date of estimating the policies, the policy holders might have the option of electing to abandon their proof, and to claim the return of the premiums paid between the dates of the presentation of the petition and the order to wind-up.

Nov. 5.—Judgment was now given in *Wallberg's* case and the kindred cases.

Lord WESTBURY.—

In this case I have to decide two points, one as to the time when the valuation of policies and annuities is to be made, the other with regard to the dealing with those sums of money that were paid into court under the orders or at the invitation of Malins, V.C., and have not been repaid. Now, on the first point, with regard to the time of the valuation of a policy or annuity, it is a matter of surprise to me that any doubt should have been entertained. Doubts, however, have been entertained by different judges even as late as the last Act of Parliament (35 & 36 Vict. c. 41), wherein some indefinite enactments may probably be attributed to the existence of that doubt. But if you examine the subject, I think it will be admitted at once that there can be no doubt upon the question. The necessity for a valuation of these claims against the company arises from this fact, that all the property of that company is under the winding-up order handed over for equal distribution among its

creditors. Of those creditors annuitants and holders of policies granted by the company are some, and the necessity of making an equal distribution of the assets of the insolvent company renders necessary also a valuation of these claims. These are claims to arise, in the case of annuities from time to time *in futuro*, in the case of policies they are contingent claims, arising upon a contingent event, namely, the death of the person to whom the policy is granted. The Legislature has determined, and in all insolvencies the same rule applies, that in the course of the administration of the estate of an insolvent company, these debts shall be valued; they must be valued; you could not withhold out of the assets of the company a large sum of money and keep it invested or in suspense, to answer the claims when they arise. You must have a present value put on these future claims, and that present value represents the sum for which the claimant, the holder of the claims, will be entitled to rank among the rest of the creditors. Now, then, when does the necessity for this valuation arise? It arises immediately on the property of the company, the debtor, being directed to be equally distributed. But when is the property of the debtor company subjected to equal distribution among the creditors? At the date of the winding-up order. Then, and not till then, is the company divested of its property. In effect the property is handed over to the official liquidator to be broken up and distributed in proportionate parts amongst the creditor claimants who are entitled. Well, then, it follows immediately that the valuation must be made when the necessity for a valuation arises. The necessity arises, as I have said, when the order to wind-up is made, and that therefore becomes necessarily the date of the valuation. Now some confusion appears to have arisen sometimes, as in *Bell's* case (L. Rep. 9 Eq. 706), which was decided on principles utterly foreign to those which govern the administration of an insolvent estate. Some confusion also appears to have arisen from supposing that the winding-up relates back to the time when the petition, on which the order is made, was presented. For some purposes it may, but the property of the company remains in the administration of the company, subject to any order of the court taking it out of the company's administration; it remains in the hands of the company until the time when the property of the company is broken up; that is, until the order for winding-up. I have no doubt, therefore, if you regard it on principles which should govern it altogether, especially when analogous to the proceeding in bankruptcy, where the valuation is always made at the time of the order for adjudication—I say, if you regard it on principle, you would have no hesitation in stating that the present value, as it is called in the Life Assurance Companies Act 1872, is the value that presents itself, when you are first obliged to ascertain that value, and that is when you enter upon the process of distribution. Now, this was recognised by the Legislature in the Companies Act 1862, which provides in the 158th section "In the event of any company being wound-up under this Act all debts payable on a contingency, and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value." Well, but the right to be admitted as a creditor must be considered as arising immediately that the property is handed over to the creditors, and no longer remains in the hands or under the administration of the debtor company. That is again at the date of the order to wind-up. Now, the meaning of that enactment was more fully explained in the rules that follow the Act, when by the 25th rule it was said, "The value of such debts and claims as are made admissible to proof by the 158th section of the said Act shall, so far as is possible, be estimated according to the value thereof at the date of the order to wind-up the company." I think that rule was a very correct one; it correctly interpreted the meaning of the Act; it was perfectly consistent with principle, as I have endeavoured to show, and perfectly consistent with the practice observed in the law, as it had been previously administered, in cases of bankruptcy and insolvency. Lord Cairns observed that rule, and in all the decisions made by him in the Albert arbitration he held that the value must be estimated and ascertained at the date of the order to wind-up, and though the Legislature did not in terms repeat that in the Act that followed the Arbitration Act, the Life Assurance Companies Act 1872, yet in effect it has done so by the direction that the present value shall be ascertained, a direction which speaks as at the date of the order to wind-up. I have no hesitation, therefore in adhering to the rule laid down by the statute and followed by Lord Cairns, and I declare that every policy and every annuity shall be admissible to proof in this administration according to the value of the policy and the annuity as at the date of the order to wind-up. And I declare that the rules given in the first schedule to the Act of last session (35 & 36 Vict. c. 41, *sup.* p. 52), shall be the rules to be followed in this arbitration for the purpose of fully carrying out the valuation of the policies and the annuities as at the date of the order to wind-up.

Well, now, we come to the next point that has been argued before me, and that is, what is to be done with the premiums upon the policies? My attention was drawn to a decision of Vice-Chancellor James in *Cook's case* (L. Rep. 9 Eq. 703), which, so far as it is necessary for our present purpose, and so far as I recognise it, laid down this rule, that if a premium upon a policy had become due according to the terms of the policy anterior to the date of the presentation of the petition upon which the order to wind-up was subsequently made, if the premium, I say, became due before that date, but the thirty days of grace did not expire until after that date, that premium might be paid by the policyholder in the administration of the company, and that he would not be liable to incur a forfeiture of the policy by reason of the premium not being paid on the very day on which the days of grace expired. I am speaking of course of a petition followed by a winding-up order, and I think that was a very moderate and just decision, and proceeded upon this, that, inasmuch as the future winding-up order was proof that the company was in a state of insolvency at the time when the days of grace expired, it would be an unreasonable and unjust thing to deny the policyholder the benefit of his policy by reason of his not complying literally with

the terms of the engagement, and paying the money at the expiration of the days of grace. I mean to follow that, and to hold that in the case of every policy brought forward for valuation, any premiums that became due between the date of the petition to wind-up, and the date of the winding-up order may be received by the official liquidator from the policyholder. That will extend it still further. For supposing that a premium become due, we will say, on the 1st Oct. 1871, the petition having been presented in the month of June 1871, that premium becoming due on the 1st Oct., and followed by thirty days of grace, would have to be paid some time in November if the company were solvent, and if it was at all reasonable to expect that the engagements in the policy would be literally kept by the company. But as that is not the fact, the fact of the winding-up order following on that petition ought to operate retrospectively to this extent, to prevent any policyholder incurring a forfeiture. I call it a forfeiture; it will be understood that I mean incurring the loss of his policy by failure to keep the engagement to pay the premiums becoming due at any time after the insolvency of the company commenced. I take the insolvency of the company, as proved by the subsequent order, as in fact commencing from the date of the presentation of the petition, and, therefore, I give the policyholder the benefit of paying the premiums that became due during that interval at any time before the policy is presented for valuation. The result of that will be this, that the policyholder presenting his policy for valuation will be obliged to pay all premiums that have become due previously to the date of the order to wind-up. Of course, in the case of a policy the premium upon which became due and the thirty days of grace also expired before the date of the petition to wind-up, and which was not paid by the policyholder, that policy becomes null and void. But in every other case, where the premiums became due during the period of insolvency that precedes the order to wind-up, the policyholder shall have the option of paying those premiums at the time when he presents his policy for valuation." But I must require him to pay the premiums before the valuation is made. And I cannot listen to any argument that was presented to me on one or two occasions, that a policy holder ought to be allowed to set off the amount of the valuation as against the premiums. The premiums cannot be made a subject of set-off. The policy must be valued as a current valid engagement. And therefore all premiums, that have become due previous to the date of the order to wind-up, must be paid, and in the premiums so required to be paid I include any premium that may become due and payable before the date of the order, though the thirty days of grace for the payment of that premium would ordinarily not expire until after the date of the order. Now that will be the rule with respect to valuation. I hope I have expressed it so that it will be understood, and that the policyholder will know what is the obligation, the condition that he must fulfil, before his policy is valued. Of course he has full liberty not to present his policy for valuation, in which case the policy will become void, and of course he will be under no obligation to pay those premiums. That leads me to the other part of the application in *Wallberg's* case, which was that the policyholder might have an immediate return made to him of premiums which he paid into the Court of Chancery under the orders of Vice-Chancellor Malins. That, however, was followed afterwards by an application made to me the other day from the same parties that a policyholder might be at liberty to elect to abandon his policy, and if he elected to abandon his policy, then that he might have a return of these premiums. I felt some difficulty at the time in acceding to that application; but having regard to the very singular terms of the order made by Vice-Chancellor Malins, I cannot of course claim a right to treat payments made under the strange invitation contained in that order, as if they were voluntary payments made by the policyholder on account of his policy. And therefore I must hold that any policyholder who has paid his premiums under that order, but afterwards elects not to prove on his policy, is entitled to a return of those premiums. If the policyholder afterwards proves on his policy, of course I should withhold the premiums, because he could not prove without payment of those premiums, and it would be an idle circuity, of which we have already had enough, to hand him out his money only to make him return that money. But where any policyholder has paid his money into court and it now stands to the suspense account created under and by virtue of that order, if he declares that he does not intend to bring forward any proof in respect of that policy, and voluntarily surrenders that policy to the official liquidators, then I hold that he must receive back the moneys that he so paid. I cannot treat those payments as voluntary conclusive payments, when they were made under the terms of that order. But I cannot repay the premiums to him if he tells me he still means to prove in respect of that policy; for then the premiums would become payable before the proofs would be admitted, and I could not allow, therefore, of the money being paid back to an individual who tells me that he will put himself in the situation of being compellable to pay that money again.

That I think will dispose altogether of the points which were raised by Mr. Southgate. I desire to have this rule, as the rule followed by Lord Cairns, fully understood. Every policy and every annuity will be valued as at the date of the order to wind-up, and the valuation will be made in conformity with the rules given in the first schedule of the Life Assurance Companies Act 1872. I should mention a question which arose in *Sullivan's* and *Smythe's* cases, that any sums of money paid by the provisional liquidator to an annuitant in conformity with the order of the 25th July 1871, will be retained by the annuitant, and he will of course deduct the amount from the sum that he will come forward to prove for the arrears of the annuity in addition to the value thereof. I have only to dispose of the costs of the application, and as it has raised very conveniently a number of points, which I have thought it necessary to deal with in the manner expressed, I think it quite right that the applicants in *Wallberg's* case should have the costs of the application out of the assets of the European Society.

Romer inquired as to what would be done with regard to policyholders who had paid their pre-

miums in accordance with the order of the 25th July 1871.

Lord WESTBURY.—They will all have the option of electing. Those who have been fortunate enough to get their money out, will have to repay it if they prove. Those who have not been fortunate enough to get their money out, shall have their money so far as it comes within the terms of the Vice-Chancellor's order, giving them leave to apply, but they shall not have that money, unless they have previously declared their election. With regard to the time within which the policy is to be presented, I think that must be the subject of a general notice. I was the more desirous of making my order in the form I have done, in order to give an opportunity to the foreign policyholders to become informed.

Montague Cookson.—With regard to the question as to interest on the premiums paid in under the orders, I understand your Lordship to say nothing about interest on either side.

Lord WESTBURY.—No.

Solicitor for Mr. Wallberg, *Kearsey.*

Solicitors for Mr. Trustram, *Halse, Trustram,* and *Co.*

Solicitors for Messrs. Sullivan and Smythe, *Wilkins, Blyth,* and *Marsland.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

END OF THE FIRST SITTINGS.

THE

EUROPEAN ASSURANCE ARBITRATION.

(BEFORE LORD WESTBURY.)

SECOND SITTINGS.

REPORTED BY R. MARRACK, ESQ., BARRISTER-AT-LAW.

Monday, Jan. 20.

RIVINGTON'S CASE.

Company — Winding-up — Contributory — Lapse of time and acquiescence — Amalgamation of companies — Attempt to make a former shareholder in the old company a contributory, on the ground that the transfer of his shares to the new company was void, and that the arrangement for amalgamation was ultra vires.

The C. Insurance Company was established in 1821 *under a deed of settlement, which provided for the dissolution of the company and professed to give the power of transferring shares in a specified manner. Subsequently it had an Act of Parliament, enabling individual members to transfer their shares, and directing that the memorial of the transfer should be enrolled in the Court of Chancery within a certain time. In* 1859 *negotiations were entered into for the transfer of the business to the N. Insurance Association. These were carried out by two deeds, by one of which* 174 *shareholders covenanted to transfer their* 11,014 *shares, out of the whole number of* 12,000 *shares to two persons, B. and L. R. was a shareholder in the C. Company, and he executed the deed in respect of his* 200 *shares. Shortly afterwards B. and L. executed a deed whereby it was declared that they held all those shares so transferred or covenanted to be transferred to them, upon trust for the N. Association. Subsequently R. further executed a transfer (in the usual form) of the same* 200 *shares to B. one of the same trustees for the N. Association, and received* £250 *cash, as a consideration for the shares. This transfer was registered and the memorial was enrolled although not within the prescribed time. Out of the* 212 *shareholders there were but twenty-three, holding* 210 *shares out of the whole number of* 12,000 *shares, that neither executed the deed of covenant to transfer, nor transferred their shares. The C. Company continued to carry on business for some time, and finally, in* 1864, *it wholly ceased to do so, and a deed was executed, whereby the transferees of the C. Company's shares transferred them and all their interest in the C. Company's business to the N. Association, to the intent that the capital and business thereof might thenceforth be amalgamated with and merged in the N. Association and the capital and business thereof. Some years after, the N. Association transferred its business to the E. Society.*

In 1872 *an order was made to wind-up the C. Company, and the official liquidator contended that R. must be placed on the list of contributories, on the ground that the transfer of his shares was in itself invalid, and that it was also invalid, as being part of a larger transaction, which was void. This larger transaction, viz., the arrangement for amalgamation between the two companies, being ultra vires both of the transferor company and of the transferee company, and moreover having never been completed and carried out:*

Held that R.'s name must not be placed on the list of contributories.

The provisions in the C. Company's deed of settlement with regard to transfers being merely directory, their non-observance was superseded by the registration of the transfer and the enrolment of the memorial, and accordingly did not invalidate R.'s transfer.

After the great lapse of time the twenty-three shareholders, who did not transfer their shares or execute the deed of covenant to transfer, must be presumed to have concurred in the arrangement. The transaction was accordingly a transfer of the whole business by all the partners, and was within the power of any common law partnership and therefore not ultra vires of the C. Company. The N. Association also had power to buy such a business. Thus the arrangement was within the power of both the companies. Moreover, after this length of time and after the intricate transactions of the companies, it would be impossible to place the companies in the position they were in at the time of entering into the contract; that being so, the contract would not be declared to be void The transfer would accordingly not be invalidated on the ground of its being an incident of a larger transaction which was invalid.

In this arbitration two principles would be adopted, first, that the lapse of time shall be taken as evidence of acquiescence and assent, and that, therefore, what has been done ought not on that ground to be interfered with; secondly, that the arbitrator would not interfere, after a considerable period of time, to annul a transaction in the nature of a contract between companies, unless he saw his way to do complete justice by meeting all the consequences of that declaration of nullity, and restoring each company to the situation in which it was at the time of their entering into the contract that he declared to be null.

THIS was an application on behalf of the official liquidator of the British Commercial Life Insurance Company to place the name of Mr. Rivington on the list of contributories to that company.

The British Commercial Company was established under a deed of settlement dated the 1st May 1821 with a nominal capital of 1,000,000*l*.

divided into 20,000 shares of 50*l.* each. Only 12,000 shares, however, were subscribed for, and calls to the amount of 5*l.* per share were made thereon. The deed of settlement contained no power enabling the company or its directors to tranfer its business to, or to amalgamate the company with, or to acquire the business of any other company. There were provisions purporting to enable individual proprietors to transfer their shares. Any one wishing to do so was to give three days' notice of his wish, stating the name, &c., of the proposed transferee; every such transfer was to be made at the office of the company in the manner prescribed by the directors; and every transferee of shares was within two months to execute at the office of the company a deed whereby he covenanted to abide by the regulations of the company. Clause 112 of the deed provided for the dissolution of the company in a prescribed manner: (*Vide sup.* p. 40.)

By the local and personal Acts 2 & 3 Will. 4, c. 38, and 10 & 11 Vict. c. 84, the company was empowered to sue and be sued in the name of certain of its officers, and it was enacted that whenever any transfer of shares should be made, a memorial thereof should be enrolled in the Court of Chancery within three months, and that until such memorial should have been enrolled, every member whose name should appear in the last memorial for the time being enrolled, should, notwithstanding any transfer of his shares, continue liable to all judgments and executions until a memorial of such transfer should have been enrolled.

In 1859 negotiations were set on foot for the transfer of the business of the British Commercial Company to the British Nation Association. This association was incorporated under a deed of settlement, dated the 28th Feb. 1855, and was registered under the 7 & 8 Vict. c. 110. The 45th clause of the deed gave the power of purchasing the business of any company of a similar nature: (*Vide sup.* p. 40.)

The negotiations for the transfer of the British Commercial Company's business were commenced by the following letter, written to the directors of that company by Mr. Lake, the manager of the British Nation Association, on the 17th Nov. 1859:

Gentlemen,—It has been suggested to the directors of this association and to myself, that a union of the business of the British Commercial Insurance Company with this would be advantageous to both institutions, and for the following reasons: . . . . . .

Under these circumstances the directors of the association would be glad if the directors of the British Commercial would consider this letter as a basis of a proposition for a union of the businesses of the British Commercial and British Nation Companies, upon the following understanding.

The shareholders of the British Commercial should be paid off at the rate of 25*s.* per share, and their shares transferred.

That the directors of the British Commercial, with the consent of the shareholders, be paid a compensation of 1000*l.* by this association.

That the staff of the British Commercial be retained by the British Nation, and that the directors of the British Nation be at liberty to apply to any director or officer of the British Commercial to assist this association in the completion of such proposed arrangement after the shareholders have decided upon its adoption.

That the trustees should be appointed to hold the assets of the British Commercial, pending the completion of the proposed arrangement after.

That an Act of Parliament should be forthwith applied for, if agreed to be necessary, to consolidate the proposed union.

Thus a strong company may be formed, to the permanent benefit of all interestsd.

HENRY LAKE,
Manager and Secretary.

By a resolution passed on the 2nd Jan. 1860, the Directors of the British Commercial Company accepted the offer contained in this letter, subject to the approval of their shareholders; and on the 21st Jan. 1860, it was resolved at an extraordinary meeting of the proprietors, that the proposal be adopted and accepted. Also an extraordinary general meeting of the British Nation Association was held on the 20th Jan. 1860, and it was resolved that the directors be authorised to take such steps as they might consider necessary for carrying the proposed arrangement into effect.

The arrangement so authorised was carried out, or was purported to be carried out by two deeds. The first deed was a covenant to transfer shares; it was dated the 8th Feb. 1860, and was made between Messrs. Bermingham and Lake of the first part, and certain shareholders of the British Commercial Company of the second and third parts. After reciting that Messrs. Bermingham and Lake had agreed to purchase the shares of the parties of the second and third parts, and all the benefit and advantage thereof at 25*s.* per share, it was witnessed, that each of the parties of the second and third parts respectively, but so far only as related to the shares of which he was a proprietor, covenanted with Messrs. Bermingham and Lake that, upon payment of a certain sum stated in the schedule thereto, he would, at the request of Messrs. Bermingham and Lake, transfer into their names or into the names of their nominees, the shares in respect of which he was a proprietor, and would in the mean time hold the shares in trust for Messrs. Bermingham and Lake, subject to the payment of the purchase money. There was also a covenant by Messrs. Bermingham and Lake to accept the transfer of the shares, and a proviso that the deed should be void if the owners of five-sixths of the shares should not execute the deed before the 5th March 1860.

The second deed was a declaration of trust; it was dated the 7th June 1860, and was made between Messrs. Bermingham and Lake, and certain other transferees of British Commercial shares of the first part, the said Messrs. Bermingham and Lake of the second part, and the British Nation Association of the third part. After reciting the resolution of the 20th Jan. 1860, and the deed of the 8th Feb. 1860, and further reciting that certain shareholders had, in pursuance of this deed, transferred their shares to Messrs. Bermingham and Lake, or one of them, or some of the other persons of the first part, nominated by them, it was witnessed that in further pursuance of the arrangement the parties thereto of the first part did thereby agree that they did take and would thenceforth stand possessed of the shares so transferred to them in trust for the British Nation Association, and to be assigned, transferred and disposed of in all respects as the board of directors of the association, or any general meeting of the association should order, direct, or appoint. And there was a covenant by the British Nation Association to indemnify the parties of the first part against all liability in respect of the shares transferred.

Out of the 212 shareholders, holding 12,000 shares, there were but twenty-three, holding 210 shares, who did not execute the deed of the 8th Feb. 1860, or transfer their shares, in accordance with the covenant therein contained, to Messrs. Bermingham and Lake, or one of them, or their nominees. None of the transferring shareholders ever gave notice of their wish to transfer, nor was any deed of covenant executed by the transferees, as was required by the British Commercial Company's deed of settlement. All the shareholders who transferred their shares received the consideration for them either in cash paid out of the assets of the British Nation Association or in shares of that association.

From 1857 Mr. Rivington was a holder of 200 shares in the British Commercial Company, and on the 20th Feb. 1860 he executed the deed of the 8th Feb. 1860, in respect of his 200 shares. Subsequently, on the 31st Dec. 1860, at the request of Mr. Lake, he executed a transfer (in the usual form) of the same 200 shares to Mr. Bermingham solely, and he received 250*l.* cash, in respect of the shares. On the 31st Dec. 1860 the transfer was registered. Early in the year 1861 he was informed by the secretary of the British Commercial Company that the memorial of the transfer would in a few days be enrolled in the Court of Chancery. The enrolment, however, was not actually made until Feb. 1865.

After the execution of the deeds of the 8th Feb. and the 7th June 1860, the business of the British Commercial Company was carried on as a separate business, and its directors issued new policies down to March 1862, and paid claims down to March 1863. On the 22nd Dec, 1864 it was resolved, at an extraordinary court of directors of the British Commercial Company—

That the existing amalgamation of the business of that company with the business of the British Nation is adopted and confirmed, and that the trustees of the company be directed to take such steps, and do such acts, and execute such instruments as might be considered necessary with a view to perfecting such amalgamation, and legally vesting the assets of the British Commercial Insurance Company in the said British Nation Life Assurance Association.

This resolution was carried into effect by the "deed of amalgamation," dated the 31st Dec. 1864. After reciting that the shares, transferred into the names of the several persons parties thereto of the first part, were so transferred in trust for the British Nation Association, and that the same constituted the whole of the shares subscribed for in the capital of the said company, except some few shares, the owners of which were unknown, and the right to which was considered to have been lost by lapse of time and non-claim or otherwise under the provisions of the deed of settlement. And, further, that divers moneys, &c. were vested in the parties of the second part, as trustees for the British Commercial Company. And further that, it being found that the continuance of the business of the company separate from the business of the association, and the severance of the assets of the company from the assets of the association were attended with much trouble and expense, it was, on or about the 30th March 1863 considered desirable that the business and assets of the company and the association respectively, should be thenceforth amalgamated and united accordingly, and that the said business and assets had, since the 31st March 1863, been in practice amalgamated and united accordingly, but no instruments had been executed for the purpose of giving full effect to such proposed amalgamation and union.

It was witnessed that, in consideration of the covenants by the British Nation Association, the several persons parties thereto of the first part did thereby transfer to the British Nation Association all the shares in the British Commercial Company respectively numbered and described in the third column of the schedule thereto (the same representing the entire subscribed capital of the company, except as aforesaid), and all their interest and goodwill in the life assurance business theretofore carried on by the British Commercial Company. To have and to hold the said shares, &c., unto the British Nation Association, their successors and assigns, for ever, "in order and to the intent that the British Commercial Company, and the capital and business thereof, might thenceforth be amalgamated with and merged in the British Nation Association and the capital and business thereof."

And it was further witnessed that the parties of the second part did thereby assign unto the British Nation Association all the moneys, &c., vested in them as trustees for the British Commercial Company, to have and to hold the same to its own use and benefit. And there was also a covenant by the British Nation Association to indemnify the parties of the first and second parts against all liability in respect of their shares.

After the execution of this deed the British Commercial Company wholly ceased to carry on business.

In 1865 the British Nation Association transferred its business to the European Assurance Society.

An order to wind-up the British Commercial Company was made on the 19th July 1872, and the official liquidator now applied to have Mr. Rivington's name placed on the list of contributories in respect of the 200 shares.

Napier Higgins, Q.C. and *H. M. Jackson* for the official liquidator of the British Commercial Company.—There was no power given by the British Commercial Company's deed of settlement to enter into, or carry out, the arrangement in question. The company being a mere common law partnership, a shareholder could transfer his shares only with the concurrence of all the other shareholders. This concurrence was not obtained. Thus the transfer was invalid. Moreover, the provisions in the deed of settlement with regard to transfer were not followed. These could not confer the right to transfer, but if they had done so, their directions must be followed in order to have an effectual transfer. Further, the transfer, if valid in itself, was an incident of a larger arrangement, viz., an amalgamation or a transfer of business, and this was wholly *ultra vires* of the transferring company. If it were contended that the whole of the members of the partnership might concur in transferring all the shares and the business, yet this was not done, for twenty-three of the shareholders holding 210 shares had nothing to do with the transfer. Again, the transferee company, the British Nation Association had no power to carry out such an arrangement as was proposed. The 45th clause of the association's deed of settlement cannot apply to the case of taking over nearly all the shares of another com-

pany. The want of power of a joint-stock company to take transfers of shares from another company, or to purchase shares of another company, has often been the subject of judicial decision; for example in—

Zulueta's Case, Re London, Hamburgh, and Continental Exchange Bank, L. Rep. 9 Eq. 270; 5 Ch. 444; 22 L. T. Rep. N. S. 84.

[Lord Westbury.—There is no doubt you, as a company, could not become an individual shareholder in another company; shares could not be transferred into your name, to be held by you as such, if that other company was a company carrying on business, but, if that other company have power by its constitution to sell its business, and a parliamentary power given to its shareholders to transfer its shares, the shares might be transferred to another company, provided the transferor company ceases to carry on business, and it is a mode then only of giving effect to a transfer of the business. Now, here, the British Commercial Company are going to give up business altogether; they transfer their shares, in order that they may effectually vest in the British Nation Association a right to the business that it was carrying on.] There was no power in the British Commercial Company to sell their business, and the British Nation Association had no power to buy this number of shares and assume the liability on them, even though the technical difficulty were removed by the substitution of the names of the trustees. [Lord Westbury.—Admit, for the sake of argument, that there was no power to enter into this contract, the question then remains whether after this lapse of time I can set aside what has been done, whether I shall have power to do complete justice if I attempt to set it aside, and whether I should not be doing the grossest injustice if I annul all the consequences of this transaction, after so great a lapse of time. . . . With rights very much better than yours, courts of equity have been in the habit of declining to entertain cases of this kind after a considerable lapse of time, and also they have frequently declined to annul the transaction when they have found it impossible to follow out the order to a legitimate end. Have you a notion of what confusion would result from setting aside the contract made, or alleged to be made, or represented to be made, between the British Commercial Company and the British Nation Association? The British Nation Association got a considerable amount of property; they got, as I said before, other shareholders; then they dealt with that property, and entered into a variety of contracts, all of which would fall to the ground, and in all of which innumerable rights and liabilities would arise, if I were to entertain the thought of annulling the entire contract between the British Commercial Company and the British Nation Association.] I am not concerned now in asking your Lordship to to make any declaration that the agreement should be set aside. [Lord Westbury.—You wish to avoid that, but I cannot accept your second argument, that this transfer to Bermingham shall be considered as a void thing by reason of its being part of and incidental to a contract which is void, without involving in my declaration the invalidity of the contract, and then there is a perfect chaos.] There are a large number of cases in which contracts have been set aside after a great many years, where a similar state of circumstances existed. In many of the amalgamations with the Albert Life Assurance Company there was as great difficulty as there is here. In the case of *Bank of China* v. *Bank of Hindustan* (L. Rep. 6 Eq. 91; 6 C. P. 54, 222), V.C. Giffard endeavoured to deal with the difficulty, and although he made a declaration to the effect that the whole of the amalgamation was invalid and void, yet he accompanied it by a declaration that the transferee bank should stand in the shoes of all those who went over from the transferor bank, and should have the benefit of *quasi* validity as to all those that went over. No acquiescence, no lapse of time can bind creditors, outsiders, who knew nothing about the British Nation Association; although it may be that, as between the two companies, such acquiescence and lapse of time may be objections against declaring the arrangement invalid. It does not follow that the avoidance of the arrangement as against the creditors should necessitate its avoidance as between the companies. Again, it may be asked whom are the creditors to look to for payment? They are not to look to the twenty-three shareholders that did not transfer; nor to the trustees Bermingham and Lake; nor to the British Nation Association. They must look to the shareholders of the British Commercial Company, who have not relieved themselves of their liability. [Lord Westbury.—The creditors will be paid by the indemnity of the British Nation Association. Does that association appear?]

Swanston, Q.C.—I appear with Mr. Montague Cookson, for the liquidator of that Association.

Lord Westbury.—Do you oppose?

Swanston.—The position we are in is rather a peculiar one. I can hardly tell your Lordship at present whether we oppose or not. The reason for this is that we do not know, until the figures are gone into, whether in a pecuniary point of view it is for the advantage of the British Nation Association to support or oppose. I suppose there is no man living who can answer that question at once; and until the liquidators can answer it, it will not be right for them to pledge themselves one way or the other.

Lord Westbury.—I do not apprehend that it is a question of election, it is a question of the validity of a contract.

Swanston.—We should be in an awkward position if we were to address an argument against our own interest. We may have our opinion as to the validity or the invalidity of the contract, but at this moment we do not know what our views about the pecuniary part of the case may be.

Fry, Q.C. and *Millar* appeared for Mr. Rivington, but were not called on.

Lord Westbury.—

I am very much obliged to Mr. Higgins for the care and ability with which he has argued this case. It has satisfied me that I have heard everything that can be reasonably alleged against the view that I entertain; but I have heard nothing that induces me to hesitate for one moment as to the course which it is my duty to adopt. The parties before me are, first of all, the official liquidators of the British Commercial Company, which was an ordinary partnership formed as long ago as the year 1821. At that time the state of the law did not admit of partners transferring their shares without effecting a dissolution of the company, neither did it admit of a very large com-

pany suing and being sued by a representative, either as an officer of the company or as a member of the company. Accordingly, the partnership of the British Commercial Company was aided by an Act of Parliament, of which there have been very many examples, which gave power to the company to sue and be sued by the public officer, or by one of its body, and also gave power to the individual members of the partnership to transfer their shares, accompanying the power with certain conditions, namely, that the memorial of the transfer should be registered in the Court of Chancery within a particular period of time, but it was not to become void if not so registered within that time; the only penal consequence was that the party transferring his shares, and who appeared on the existing register, would, notwithstanding the transfer, remain liable for the debts of the company, unless and until the name of the transferee was duly registered and duly memorialised in his place. This company carried on business for a considerable period of time. With regard to the mode of transferring its business, it would have the common law power incidental to every common law partnership; but that power could only be effectually exercised by every member of the partnership concurring in the exercise thereof. Subject thereto, every individual member of the partnership had a right under the statute to transfer his share or shares to a nominee, and the transfer would be effectual, provided the conditions with regard to registration, that I have already adverted to, were observed. In that state of things, and in the month of November 1859, the British Commercial Company entered into negotiations with the British Nation Association for the transfer of its business to the British Nation. Meetings were held of the proprietors of the British Commercial Company for the purpose of considering the proposal of the British Nation Association. Meetings were in like manner held by the British Nation Association for the purpose of considering whether they should or should not enter into a certain kind of amalgamation with the British Commercial Company; that is to say, take a transfer of the business of the British Commercial Company, and thenceforth have an union of the business of the two companies. The words are peculiar: "It has been suggested to the directors of this association and to myself that an union of the British Commercial Company with this—that is, the British Nation Association—would be advantageous to both institutions." That object was accordingly accomplished. The proprietors of the British Commercial Company appear all to have concurred in the resolution to adopt the proposal of the British Nation, with the exception of some few. I think they numbered twenty-three in the whole. The resolutions on the part of the British Nation Association, were almost more unanimous, and then came the question, what should be the machinery adopted in order to carry those resolutions into effect. Now it is quite clear that the only machinery that could be adopted would be making a transfer of the shares in the British Commercial Company to nominees of the British Nation. The British Commercial Company was to cease to carry on business as a company, and therefore the transfer of its shares would be a mode only of transferring its business. That course was accordingly adopted. Now I may mention by the way that I shall have no difficulty in holding, and do in reality now hold, that after this great lapse of time, the concurrence of the twenty-three shareholders in the British Commercial Company, who did not execute the deed, must be presumed, and I should therefore have no difficulty in holding that the transfer by the British Commercial Company to the British Nation Association at this distance of time is to be treated and regarded as a transfer by all the partners in the British Commercial Company. But independently of that, which is not very material for the decision of this case, the shares which were transferred by the British Commercial Company to the British Nation Association must, as I have already observed, be regarded as a mode of transferring the business; for, although I quite agree to the proposition that the British Nation Association, as a company, could not take individually a transfer of the shares in the British Commercial Company, so as to be registered as shareholders in that company, yet it was perfectly competent to the British Nation Association to take a transfer of the shares from the partners of that company, seeing that the British Commercial Company was no longer to go on as a current trading company, I regard the transfer therefore as a mode of transferring the business. Now it appears that a gentleman of the name of Rivington was, at the time of the agreement with the British Nation Association, the registered holder of 200 shares in the British Commercial Company. He concurred in the proposal to transfer the business of the British Commercial Company to the British Nation Association. The British Nation Association accordingly, when the contract was finally entered into, presented to him a transfer to a gentleman of the name of Bermingham, and requested him to execute that transfer. He was to receive a certain sum of money as the price of his shares, and he was paid accordingly by the hands of Bermingham, but no doubt out of the money of the British Nation Association. That particular transfer by Rivington to Bermingham was duly completed in conformity with the requisitions of the statute. Mr. Higgins has said that certain preliminary things, which are directed to be done by the deed of settlement of the British Commercial Company in the event of the transfer of shares, were not observed. I cannot pay attention to that, because I regard these provisions in the deed of settlement of the British Commercial Company as merely directory, and I think the inquiry whether they were observed or not, is superseded entirely by the fact that the transfer from Rivington to Bermingham, was accepted and duly registered and memorialised in a complete manner in the year 1865; I shall not therefore in any way enter into the question of the validity of that transfer by reason of these directory provisions not having been in terms observed, if it be the fact, of which there is no proof, that they were not observed. Then Mr. Higgins, in that state of things, presented to me a case which involves these two propositions. He contends first that the transfer from Rivington to Bermingham was informal and incomplete. That is a question which would have no other result, if it were determined in his favour, than the mere removal of Bermingham's name, and the restoration of Rivington's name to its original position. I try that question first upon the ground to which I am referred, namely, whether according to the statute the transfer to

Bermingham was formal and complete, and I find no reason, upon the facts before me, to impeach that transfer or the memorial thereof. That being so, Mr. Higgins looks further than the bare transaction of the transfer, and impeaches the whole of the dealing between Bermingham and Rivington, because it was a part of a larger transaction between the two companies, contending that such dealing was the mere incident and consequence of that transaction, and if that be bad, this incidental thing must fall with it. Mr. Higgins, therefore, now calls upon me, in the year 1873, to enter into a consideration of the legal validity of the contract made between the British Commercial Company and the British Nation Association in the year 1859, and to pronounce that that contract was void as being *ultra vires* of both the contracting parties. If it were *ultra vires* of one of the contracting parties, and it had been properly impeached within due time, it might have been set aside; but I am asked here, at the expiration of twelve or thirteen years, to undo that contract altogether, to pronounce it to have been *ultra vires*, and, without any further consideration, to annul it, to pronounce it to be void, and to pronounce this particular transfer destroyed, by reason of its having been an emanation from, or a child of, that void contract. Mr. Higgins appeared to be a little alarmed at the consequence of what he was asking, and he strove at the end to say that I might annul the dealing between Bermingham and Rivington, upon the ground of the invalidity of the contract, without declaring expressly that the contract was invalid, or without pursuing the implied declaration of invalidity to all the consequences that must result therefrom. I can do no such thing. If I avoid this particular transaction, upon the ground of the invalidity and nullity of the contract out of which it flows, I must declare that contract invalid, in order to give any reason for the conclusion at which I am asked to arrive. Now, in the first place, I am not at all inclined to adopt the argument that the contract was *ultra vires* of either company. If I take in aid the proposition that I have already mentioned, namely, that after this lapse of time the twenty-three shareholders in the British Commercial Company, whose signatures to the deed cannot be produced, must be presumed to have concurred in and sanctioned the arrangement —a very easy conclusion to be arrived at, for there is no trace, during the years that have elapsed, of their ever having complained of the arrangement made with the British Nation Association. I say, if I make that presumption, and adopt the conclusion to which it leads, then the transaction was clearly within the common law powers of every common law partnership, and therefore it would not be *ultra vires* of the British Commercial Company. And then if I look at the deed of the British Nation Association, I find an ample power given to that association to buy and take transfers of the business of another company carrying on business in a manner similar to that of the British Nation. I am by no means prepared, therefore, to arrive at the conclusion that there was any lack or want of requisite legal power of contracting in either of these two companies; but I am very much more solicitous to point out, at an early period of this arbitration, that I shall give the utmost possible value and weight to lapse of time during which transactions have been permitted to go on unimpeached; and I adopt two principles; one, that the lapse of time shall be taken as evidence of acquiescence and assent, and that therefore what has been done ought not on that ground to be interfered with; and the second principle is this, that I will not interfere, after a considerable period of time, to annul a transaction in the nature of a contract between companies unless I see my way to do complete justice by meeting all the consequences of that declaration of nullity and restoring each company to the situation in which it was at the time of their entering into the contract that I declare to be null. Now, I beg the attention of counsel to what has been done in this case, and to the impossibility of my finding a way to the accomplishment of what is just and right, if I were to begin by setting aside this contract that has now been acquiesced in by both sides for so many years, and then attempt to restore the parties to their original position. Part of the contract was this, that the shareholders who refused to become shareholders in the British Nation Association should receive a certain sum of money for their shares. That was done in a great variety of cases. They took the money, they transferred their shares, in order that the business might vest in the British Nation Association, and from that time, the year 1860, until the present time, there has been no attempt to question that part of the transaction. The British Nation Association got, by virtue thereof, a great acquisition of business, and if I annul the contract, how can I restore to the shareholders of the British Commercial Company, who are brought back to their original position, the benefit of that business? If I annul the contract, the British Nation Association must account for all they have got under that contract. They got the business, and the profit of the business, and that is something which they would be bound to restore to the shareholders of the British Commercial Company if I annul the arrangement. How is it possible that that can be done? But that was one part only. There was another set of shareholders who consented to become and did become shareholders in the British Nation Assosiation, and who were registered as such, and held out to the world as such, and who threw in their lot with the British Nation Association. How in the world can I undo that, and put them in their former position, and meet all the consequences that have resulted from their having acquired in the eyes of the world a new position under this contract? Everybody conversant with the subject will see the utter impossibility of retracing the steps that have been taken in that part of the transaction. But then comes the other thing, which is still more conclusive. The British Nation Association having acquired all this property, and having united this body of shareholders with its own, and having paid off those who were unwilling to become so united, in that state of things, proceed to sell their status, their business, their advantages, including the advantages they got under this contract, to the European Society, and the European Society are now the holders thereof. Can I make the European Society disgorge, for the benefit of the resuscitated shareholders of the British Commercial Company, what they, the European Society, have derived by reason of the transfer of the property of the British Nation Association, or that which has been acquired by the addition of the property

of the British Commercial Company? It would be hopeless to attempt such a thing; a *restitutio ad integrum*, to adopt Mr. Higgins's phrase—and a very correct one—of the shareholders of the British Commercial Company is utterly impossible under such circumstances. It would be an impossible thing to trace the different ramifications of interests that have arisen since the contract was entered into, to unravel them, to undo them and place the parties in the position they would have been in but for that contract: and in that way and upon those grounds to annul the transaction itself. Courts of justice have very wisely said that they shall not be invoked after a certain period of time. They have done that, because they hold that the period of acquiescence furnishes good ground for presumption that things have been confirmed, accepted, and agreed to be abided by by individuals, the absence of whom to the original coutract might have afforded ground for complaint against that contract, if the ground had been bronght forward within such a period of time as was not sufficient to afford such presumption as I have mentioned. They have also refused it on the other ground, that they will not annul a contract, where the lapse of time has been sufficient, or has given birth to such a variety and complications of interests, derived from and depending upon the basis of that, after so long a period as the period of this transaction now sought to be impeached. They will not annul it, if they find themselves utterly unable to place the parties in their original position. Now, it is precisely what I have here. I am justified, nay, I am bound, to derive every reasonable presumption of validity after this lapse of twelve years in favour of the original contract. I am bound to keep my hands from meddling with that original contract, and of imputing to it invalidity, unless I can follow out the first step to all the others that must legitimately follow, and can see my way to do complete justice by the restoration of the parties to their original position. I will certainly never lend any powers that are vested in me to be exercised in a manner inconsistent with those two rules, or that will at all impair their force and validity in a court of justice, much more in a court of arbitration. I now come to the conclusion that the application of the liquidators to strike out Mr. Bermingham's name, to be replaced by Mr. Rivington's, is one without any kind of merit, of law, of equity, or of reason. I refuse the application with costs to be paid to Mr. Rivington out of the estate of the British Commercial Company. I say nothing about the costs of the official liquidators or of the British Nation Association, but I shall reserve the consideration thereof with liberty to apply. I may at the same time say that, in my opinion it was the duty of those who instructed counsel for the British Nation Association, to maintain the validity of the contract, and to oppose the strongest ground to the attempt of the client of Mr. Higgins to undo that contract; and I shall take that into consideration when I dispose of the question of costs of the official liquidators, but I will take care for the future that those gentlemen shall not be placed in a position in which they will have a conflicting duty, for I will myself regulate, in case of any question arising between these companies, who, I may say, are part of my flock, and are under my control—if there shall be any dispute between them—how they shall be dealt with, they shall come to me to know the manner in which I will have that dispute argued and settled. At present, therefore, I reserve the consideration of the costs of the official liquidators, and they may apply to me in order to show me that there was reasonable ground for appearing in a position of neutrality, neither opposing the claim nor supporting it. Mr. Rivington will have his costs. The question of the other costs reserved, with liberty to apply.

Napier Higgins.—This decision is to the effect that Mr. Rivington is not to be settled on the list of contributories; that will be without prejudice to any future application in case there should be a B list?

Lord WESTBURY.—I will not clog the order with any expression of that kind at all; the order will speak for itself. He is not to be placed on the register in lieu of Mr. Bermingham.

Napier Higgins.—In case it should turn out that the persons who will be placed on the list are unable to pay the debts, we may have to resort to others.

Solicitors for Mr. Rivington, *Rivington* and *Son.*

Solicitor for the official liquidators of the British Nation Association, *J. Tucker.*

Solicitors for the official liquidators of the British Commercial Company, *Mercer* and *Mercer.*

Monday, Jan. 20.

GARDINER'S CASE.

Life Assurance Company—Amalgamation of companies—Winding-up—Policy—Novation of contract—Novation not created by Act of Parliament—One of the companies referred to arbitration misnamed in the Act—Parties to an application to wind-up—Policy that refers to some unknown deed of settlement.

The A. Life Assurance Company transferred its business to the B. society, and subsequently an Act of Parliament was passed which enacted (inter alia) that the B. society should be liable on any policy, whether issued by the B. society or by the A. company. On its being contended that the Act created a substitution of liability, and that every policyholder in the A. company was compelled by this Act to look for payment to the B. society only, it was

Held, that this was not the meaning of the Act, and that the liability of the A. company still remained.

The European Life Insurance *and Annuity Company held to be one of the companies under the jurisdiction of the arbitrator, although its name was misprinted in the European Assurance Society Arbitration Act* 1872 *as the European Life* Assurance *and Annuity Company—it being clearly a mistake, and further, the Arbitration Act referring to arbitration the relative rights, &c. of the absorbed, as well as the scheduled, companies.*

A policy was granted by an insurance company, whereby the company covenanted with Major G. that it would, on and after his death in the lifetime of Mrs. G., pay to her an annuity of £300 *during her life, "according to the provisions of the deed of settlement of the said company, bearing date the 10th Feb.* 1819." *Some years after Major G.s' death, his widow brought in a claim on her policy against the company, and applied to have it wound-up; but it was objected on the part of the directors representing the company, that, the covenant having been with Major G., the per-*

sonal representative of Major G. ought to be a party to the application.

Held, that this was not necessary.

On its being further objected that the policy did not refer to the deed of settlement of the company, dated the 10th July 1820, but to a deed of some prior date, about which nothing was known, and which might be the deed of some other company, it was

Held that this objection did not affect the claim on the policy, the directors not being able to explain what was the deed that was referred to.

The order to wind-up a subsidiary company not made to date from the date of the order to wind-up the principal company, but from the actual date of the order to wind-up the subsidiary company.

This was an application for an order to wind-up the European Life Insurance and Annuity Company.

This company was established under a deed of settlement dated the 10th July 1820. Its name was originally "The European Company," and was afterwards altered to "The European Life Insurance and Annuity Company," but under what circumstances is unknown. By a deed dated the 8th Dec. 1858 the company transferred its business and assets to the People's Provident Assurance Society. In 1859 an Act of Parliament was passed called "The European Assurance Society's Act 1859," by which the name of the People's Provident Assurance Society was changed to "The European Assurance Society," and it was further enacted

Sect. 9:

The society shall be liable to the rightful holder of any policy issued before the commencement of this Act, and to the obligations of which the society were originally or had become or had agreed to become liable, and whether issued originally by the society or by the European Life Insurance and Annuity Company, as if the society had themselves issued the policy, and every such holder shall have all rights and remedies against the society accordingly.

On the 1st Aug. 1832, a policy had been granted by the European Life Insurance and Annuity Company, whereby, in consideration of the annual premium of 93*l.* 7*s.* 6*d.* three of the directors of the company covenanted, on the part of the company, with Major Gardiner, that the funds and property of the company should at all times after his decease, in the event of his death in the lifetime of Eleanor Gore (afterwards Mrs. Gardiner), be subject and liable (according to the provisions of the deed of settlement of the said company bearing date the 10th Feb. 1819), to pay to her during the remainder of her life an annuity of 300*l.*

Major Gardiner duly paid the premiums from time to time to Mr. Finlay, the agent at Dublin of the company, and, after the union of the two companies, the agent of the European Assurance Society.

Before the union, the receipts for the premiums were headed "European Life Insurance and Annuity Company."

In 1862 and 1863 the heading was "European Assurance and Guarantee Society."

On the 19th April 1864, Major Gardiner died, and the instalments of the annuity were thereafter paid to Mrs. Gardiner by the European Assurance Society, and she sent receipts therefor to that society. The form from 1866 being as follows:

Received the 2nd day of May 1866 from the European Assurance Society the sum of 150*l.*, being the amount of one half year's payment of annuity due to me on the 20th April 1866, less income tax.

Annuity	£150	0	0
Less Income Tax	2	10	0
	£147	10	0

Eleanor Gardiner.

Mrs. Gardiner never received any circular or communication relating to the transfer of the business of the European Life Insurance and Annuity Company, and she believed that no such circular or communication was ever received by her husband.

She now applied to rank as a creditor on her policy against the European Life Insurance and Annuity Company, and, as such creditor, to have the company wound-up.

Notice of the application was served on two persons, who at the time of the union of the businesses were directors of the European Life Insurance and Annuity Company.

Gill and *Henderson* appeared for Mrs. Gardiner.

Napier Higgins, Q.C. and *Montague Cookson* for the official liquidator of the European Assurance Society.—It was the intention of the European Assurance Society's Act 1859, to put an end to the European Life Insurance and Annuity Company, and to create a new body out of the two companies, and to saddle that new body with all the liabilities of both the companies. Thus the Act of Parliament effected a novation with the European Assurance Society, and the policyholder's consent was not requisite. She is accordingly entitled to claim only against the European Assurance Society. [Lord Westbury.—In order to define the measure of their right, the Act of Parliament says, the policyholders shall have the same rights as if the policy had been granted by the society; and you infer from that, very ingeniously, that then the status of the policyholder is entirely altered, and that the policy is now to be taken by force of this enactment as having been originally granted by the European Assurance Society. That is not so; it is for the purpose of expressing the nature of the right or remedy, and not for the purpose of altering a policy granted by the European Life Insurance and Annuity Company into a policy granted by the European Assurance Society.]

Davey for the directors served with the application.—The company is described in the schedule to the Arbitration Act as the European Life Assurance and Annuity Company. Of course this company is intended, the word Assurance being substituted for Insurance. I don't know whether this is sufficient to exclude it from your Lordship's jurisdiction. [Lord Westbury.—There is nothing to bring it into doubt as to what was the company intended by the words contained in the Act. I should have no hesitation in holding that the company called the European Life Insurance and Annuity Company is the company that was intended to be designated, there being no other company brought to my knowledge that has the title of European Life Assurance and Annuity Company, but in addition to that, it is not merely the scheduled companies which are included in the Act of Parliament, but also the absorbed companies, of which this is one.] The policy refers, not to the deed of settlement of the company, dated the 10th July 1820, but to some earlier deed of the 10th Feb.

1819. It may, for anything known to the contrary, be that this is the deed of some other partnership. [Lord WESTBURY.—You received the premiums. How can you say the policy was not gtanted by you? If there ever was such a deed as that mentioned, namely, of the 10th Feb. 1819, it must have been in your possession, and you are bound to produce it. I cannot listen to any objection derived from the possible contents of a deed which ought to be in the possession of the objecting party.] I appear for two of the directors, and not for the company. [Lord WESTBURY.—Nobody can give the explanation but yourselves, and if there is any difficulty you have the power of removing it.] We have not the means of making inquiry. [Lord WESTBURY. — Mr. Davey very properly calls my attention to the fact that the recital in the annuity grant mentions a deed of a different date to the deed which is mentioned here in the case; but he cannot explain to me what that deed was, and therefore I shall not listen to the objection.] The only other point is that the covenant is with the husband, and it is doubtful whether Mrs. Gardiner is in a position to sue. Whether her remedy is at law or in equity, it may be open to consideration whether the personal representative of her husband ought not to be a party.

Lord WESTBURY.—

That is very proper to be considered, but I do not think it is open to any doubt. The contract, no doubt, so far as it consists of the covenant, is a covenant with the husband and his representatives, and the covenant is a further security for the fulfilment by the company of the grant which is subjoined, and which arises in favour of the wife after the death of the husband. It is a graut, therefore, to Mrs. Eleanor Gardiner, to arise when she shall become free of coverture upon the death of her husband, and that contract is very distinct. It runs thus: "The funds and property of the company shall at all times after the decease of John Gardiner, in the event of his death in the lifetime of Eleanor Knox Gore, be subject and liable (according to the provisions of the deed of settlement of the said company, bearing date the 10th Feb. 1819) to pay to Eleanor Knox Gore, or her assigns, during the then remainder of her life at the office of the company, an annuity of 300*l*." Now there can be no doubt that that is a good grant to the wife. Whether it might not amount to a grant at law, as well as a grant in equity, may be subject to some donbt. But it is clear that the grant is one which would give to this lady the independent power of suing the company by virtue of the grant, without the necessity of invoking her husband's covenant, if she sued the company in equity; because it is distinct—the grant is—they covenant with the husband in manner following, that is, so and so; then the funds and property of the company shall be subject and liable to pay to the said Eleanor Gardiner. Now Mr. Davey very properly put it to me as if the remedy at law depends upon the husband's covenant; then the only action, that could be brought at common law, would be by the representative of the husband; but if the remedy is in equity one capable of being enforced and claimed by the wife, then it would be still requisite that the suit in equity should have the representative of the husband as a party. Now the general rule, no doubt, is that you must have the holder of the legal estate a party in equity, in order to bind the legal estate, but that rule would not be applicable to a grant of this kind, because the grant makes the funds and property of the company distinctly liable to the wife after the cessation of the coverture of the wife with the husband. I do not think, therefore, that even that technical difficulty exists. I think the suit would be properly constituted if brought by Mrs. Eleanor Gardiner, the widow, against the society; and therefore, as she could sue in that capacity, whether she might or might not be required to add her husband's representative, would probably depend upon any suggestion being made that the husband had acted in a manner to interfere with the widow's right to sue. In the absence of any such suggestion I think the suit would be properly constituted by a bill by the widow aloue against the company. Then the other objection that the widow has accepted the company by giving receipts such as I have had produced to me, is bare of all possible suggestion of there having been a distinct agreement by her to release the one company and accept the other in lieu thereof; and, although it has been ingeniously argued upon the Act of Parliament, yet I cannot for a moment take the Act of Parliament as amounting to a statutory declaration that a policyholder in the position of Mrs. Gardiner shall be deprived, by virtue of that Act, of her original grant made by the grantor, and be driven to rely exclusively and solely on the European Assurance Society. It would be, as I have already said, a monstrous thing to impute to the Legislature that they dealt with private property in that manner. I think, therefore, that she is entitled to rank as a creditor of this society direct, and therefore is entitled to an order to wind it up.

Napier Higgins referred to the 4th section of the Life Assurance Companies Act 1872 (35 & 36 Vict. c. 41, s. 4), which enacts that the commencement of the winding-up of the principal company shall, save as otherwise ordered by the court, be the commencement of the winding-up of the subsidiary company; and suggested that the winding-up of the European Life Insurance and Annuity Company, should date from the order to wind-up the European Assurance Society.

Gill.—For this particular case it certainly would be for the benefit of Mrs. Gardiner; but how it would affect other people, I do not know. I do not know that I can assent to it. In presenting a petition to wind-up the company, I am presenting a petition on behalf of myself and all other creditors. There may be creditors that are policyholders, and may obtain a benefit; and to date it from the date of the winding-up order may be very good for me, but not for others. [Lord WESTBURY.—I cannot take this leap in the dark. I must adhere to the ordinary course of having the order that I make to-day dated as of to-day.] The petition was originally presented to the Court of Chancery before the passing of the European Assurance Society Arbitration Act 1872, and has been transferred to this court since. I presume the winding-up will date from the presentation of the petition to the Court of Chancery. The question is one of costs—how we are to get the costs of the original petition that was pre-

sented to the Court of Chancery. [Lord WESTBURY.—I cannot deal with that at present. I am making an order upon a petition transferred to me by the Act. The directors who appear will have their costs, inasmuch as it was a matter of necessity that the company should be brought before the court before any winding-up order could be made.]

Bedall.—I appear for a policyholder in support of the application. It is usual in the Court of Chancery to give one set of costs to the creditors who support the petition to wind-up.

Lord WESTBURY.—A very bad practice indeed. I should not adopt any such bad principle as allowing people to come here and ask for costs. You have come here of your own accord, without being required to, and you shall not take any part of the money of the company as a reward for having done that act of supererogation.

Napier Higgins. — The liquidators of the European Company were obliged to appear, because it was not certain whether the directors would appear, and it was to our interest to see that no order should be made so as to diminish the funds.

Lord WESTBURY.—Must you not take your costs out of the European estate? If you come here in discharge of that duty to the estate, let your estate remunerate you. I shall not adopt any practice such as I am told exists in the Court of Chancery, which will have the effect of multiplying costs unnecessarily.

Solicitors for Mrs. Gardiner, *W. T. Manning.*

Solicitors for the directors, *Ellis* and *Ellis.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Tuesday, Jan. 21.

PUDDICOMBE'S CASE.

Life Assurance Company—Amalgamation of companies—Winding-up—Novation of contract—Policy—Refusal to discharge order of chief clerk admitting an annuitant's claim on the old company.

In 1862 *the W. Life Assurance Company transferred its business to the B. Society; an order was made by the Court of Chancery to wind-up the W. Company; and an advertisement was issued calling on creditors to come in and prove their claims before a certain date. P. was an annuitant of the W. Company, but did not make any claim within the prescribed time. She accepted the instalments on her annuity from the transferee company, and gave receipts to it down to* 1872, *when it was ordered to be wound-up; thereupon she obtained leave to prove her claim against the W. Company. She attended before the chief clerk, and the solicitors of the then official liquidators of the W. Company also attended, but did not oppose the application.*

The chief clerk made an order that P. be admitted a creditor of the W. Company for 326*l.* 11*s.*, *the value of her policy. The present official liquidator, appointed in the arbitration, applied to have the order discharged on the ground that under the circumstances she was precluded from claiming against the W. Company, and that the solicitors to the then official liquidators ought to have opposed her application.*

The application was disallowed, the claim before the chief clerk not having been opposed by the official liquidators.

THIS was an application on the part of the official liquidator of the Waterloo Life, Education, Casualty and Self-relief Assurance Company, to discharge an order of a chief clerk of the Master of the Rolls, admitting Miss Puddicombe to be a creditor of the company.

In 1852, the company, in consideration of 500*l.*, granted an annuity of 46*l.* 5*s.* to Miss Puddicombe during her life. In 1862, the company transferred its business to the British Nation Association. Circulars were sent to the Waterloo Company policyholders announcing the fact, but none of these circulars were received by Miss Puddicombe.

Subsequently to this transfer of business, she received the instalments of her annuity from the British Nation Association, and gave them receipts until 1865, when the British Nation Association transferred its business to the European Society; after which time she received the instalments from the European Society, and gave them receipts down to 1871.

On the 6th Dec. 1862, an order had been made by the Court of Chancery to wind-up the Waterloo Company, and advertisements were inserted in the *London Gazette*, the *Times*, and other newspapers in Jan. 1863, requiring creditors to send particulars of their debts or claims to the official liquidator before the 9th Feb. 1863, and, if required by notice from the official liquidator, to come in and prove their debts or claims at the chambers of the Master of the Rolls at such time as should be specified in such notice, or in default thereof they would be excluded from the benefit of any distribution made before such debts were proved. Miss Puddicombe made no claim against the company at this time. But after the European Society had been ordered to be wound-up on the 12th Jan. 1872, Miss Puddicombe, in April 1872, applied for and obtained leave to go in and prove such claim as she could establish against the Waterloo Company, notwithstanding that the time had expired for adjudicating upon claims. In pursuance of this leave she attended before the chief clerk of the Master of the Rolls, and made a claim for 326*l.* 11*s.* as the value of her annuity policies. At that time there were official liquidators appointed by the Court of Chancery. Their solicitors attended before the chief clerk, and did not oppose the application. Accordingly an order was made by the chief clerk that Miss Puddicombe "be admitted a creditor of the Waterloo Company for the sum of 326*l.* 11*s.*, being the amount of the present value of a Government Annuity for the sum of 46*l.* per annum, the amount of the annuity of the said Miss Puddicombe purchased from the above-named company."

Montague Cookson (with him *Napier Higgins*, Q.C.), for the official liquidator of the Waterloo company appointed by Lord Westbury in the arbitration, contended that lapse of time, coupled with deliberate abstention in taking advantage of the advertisement inviting her to prove her claim, and with the continuous receipt during ten years of sums of money in respect of her policy from companies, as to which she had notice that they were paying because the liability had been transferred to them—all this showed acquiescence and laches on her part such as to bar her right of proof against the original company. Then there

was the difficulty that the annuity ought to be valued as at the date of the order to wind-up, *i. e.*, as long ago as the 6th Dec. 1862. On the application being made to prove in 1872, it ought to have been opposed by the solicitors of the then official liquidators.

[Lord WESTBURY.—But it was not; thus the thing is concluded against them. The shareholders must be bound by the act, unless it is a fraudulent one. You see there is a very great deal of difficulty as to the present value; but if I hold that you have no ground for discharging this order, or rehearing it, and that you assented, acting as you conceive *bonâ fide*, to that being the value, then I should refuse to disturb the order, limiting my decision to the special circumstances of this case.]

Cracknall appeared for Miss Puddicombe, but was not called on.

I see no reason for discharging the order after all that has been done, but I will not make it a precedent for any future case that comes before me, unembarrassed by a judicial order. I am disposed in this case to refuse to disturb the order of the Master of the Rolls. Nobody has regretted more than myself the position which the chief clerks have been permitted to assume. It never was intended that they should exercise anything like a judicial power, yet this practice has sprung up that when, under a decree for administration or an order like this, a creditor brings in a claim and the other side appears and says "We have no objection to this," then the chief clerk, not being desired to refer the matter to the judge or to reserve the matter for the judge, makes the order. It is improperly called an order—he only admits the claim, and makes this memorandum of the fact of the admission by him of the claim, the matter not being opposed by the proper representative of the estate; and that is a very convenient practice, otherwise, under decrees of administration, and the many thousands of such decrees, if the chief clerk were to be compelled to go to the judge, and say, "Here is a man who has brought in a claim for grocery supplied to a testator amounting to 50*l.*, and the executor says it is right," and then it is said, "But I cannot admit it without your authority," that would be an inconvenient practice. But it must not be supposed that this is a judicial order; it is a memorandum of the fact that the claim has been admitted by the chief clerk, it not being opposed, and the parties not desiring to have the opinion of the judge upon it. I shall make an order to this effect: Having regard to the special circumstances of this case, and to the fact that Miss Puddicombe was permitted by the Court of Chancery to go in and prove such claim as she could establish, and to the fact that she did bring in a claim for the sum of so and so, which was admitted and not opposed by the official liquidators, this court doth refuse to interfere with that order, and doth confirm the same under the peculiar circumstances of the case. Miss Puddicombe must have her costs, and you, Mr. Cookson, must have your costs out of the estate.

Solicitor for Miss Puddicombe, *G. R. Puddicombe.*

Solicitors for the official liquidator of the Waterloo Company, *Mercer* and *Mercer.*

Tuesday, Jan. 21.

CONQUEST'S CASE.

Life Assurance Company—Amalgamation of companies—Winding-up—Novation of contract—Policy—Acceptance of bonus—Amalgamation circular—Policyholder held not to have accepted the liability of the new company.

In 1861, *C. effected a policy on her own life with the W. Life Assurance Company, "with profits, such profits to be appropriated, so as to make the policy payable during the lifetime of the assured." In* 1863, *the W. Company transferred its business to the B. Association, and on this occasion a circular was sent to the policyholders by the W. Company, announcing the union of the two companies, and stating that "the terms and conditions contained in the policies issued by the company will remain unaltered by this arrangement;" and further that "the union of companies increases business, bonus, &c.;" and that "it has been arranged that in all future bonuses they shall participate on an equality with the other policyholders in the conjoint companies. They will thus secure not only all the benefits to which they were entitled in this company, but the additional benefits to be derived from the accumulation of income and power." The circular further offered an indorsement on the policy, or a new policy in exchange. Accompanying this, was another circular from the B. Association, offering an indorsement, or a new policy. The policyholder took no notice of these circulars, but paid her premiums to the B. Association, and accepted receipts from them until* 1865, *when the B. Association transferred its business to the E. Society. She then paid her premiums to the E. Society, and accepted receipts from them. In* 1867 *she received a circular from the E. Society, announcing that a bonus had been allotted by the E. Society, and that a reversionary sum had been added to her policy. She took no notice of this bonus circular. In the winding-up, she claimed on her policy against the W. Company, but it was contended that her claim must be against the E. Society.*

Held, that she was entitled to rank as a creditor of the W. company.

The payment of the premiums was in conformity with the directions contained in the amalgamation circulars; and with regard to the bonus, the policyholder had not, by her silence, accepted it; but even if she had, she would not have thereby accepted the liability of the E. society, for the amalgamation circular stated that the terms and conditions of the policy, and therefore the liability of the W. company, would remain unaltered, with this further addition, that in all future bonuses she was to participate on an equality with the policyholders of the conjoint companies.

THIS was a question of novation.

On the 22nd May 1861 the Wellington Reversionary Annuity and Life Assurance Society granted a policy for 300*l.* to Mrs. Conquest, then Emma Clare, widow, on her own life. At the head of the policy were these words: "With profits, such profits to be appropriated so as to make this policy payable during lifetime of the assured." In 1863 negotiations were set on foot for the transfer of the Wellington Society's business to the British Nation Association, and upon the completion of the transfer the following circulars were sent to the policyholders of the Wellington Society:—

Wellington Life Assurance Society,
3, Chatham-place, Blackfriars, London, E.C.,
31st July, 1863.

Dear Sir,—The proprietors of this society, on the recommendation of the directors, and after very mature deliberation, have decided to accept an offer made by another association to unite the business of the two companies. In adopting this course, the directors feel that they are consulting the interest of all parties in their institution, and that they will obtain larger prospective advantages to the policyholders than could have been secured under the best auspices in a separate condition.

This union, which takes effect from midnight of the 15th June last, has been made with the British Nation Life Assurance Association, of 316, Regent-street, where, for the future, the business will be carried on.

The terms and conditions contained in the policies issued by this society will remain unaltered by this arrangement. The policyholders are fully guaranteed for all claims under their present policies by the British Nation by the agreement between the two companies; but any of the assured desiring it can have the indorsement to that effect on their policies, or can receive new policies from the British Nation.

All communications should henceforth be addressed and all premiums paid to the receipt of Henry Lake, Esq., manager of the British Nation Life Assurance Association, 316, Regent-street, London.

Should you, however, have been accustomed to pay your renewal premium through an agent, you will still be enabled to do so, as arrangements will be made to empower the existing agents of the Wellington to act for the British Nation Company.

The report of the British Nation for 1862-63, lately issued, shows the following:

Annual premium income	£159,821
Invested funds and property	£277,575

This most satisfactory position is since further improved, and the income of the British Nation is now raised to 170,000*l.* per annum.

The great advantages of uniting assurance companies are now being thoroughly recognised and appreciated by the public.

They may be summed up briefly thus:

The union of companies increases business, income, security, and bonus, and decreases expenditure, competition, and the liability to fluctuation. The business of two companies can be conducted in one office, and by one staff, without material additions, and the whole of the saving goes to improve the prospects of a large bonus.

The directors feel assured, therefore, that you will perceive at once the advantages, which this union will secure to the policyholders.

The Wellington policyholders will have not only the security of the large annual income of the joint business, but it has been arranged that in all future bonuses they shall participate on an equality with all the other policyholders in the conjoint companies. They will thus secure not only all the benefits, to which they were entitled in this company, but the additional benefits to be derived from the accumulation of income and power.

The directors feel that in the step they have taken they have considered the best interests of the assured, and have obtained for them increased security and large permanent advantages.

H. GORDON, Chairman.
C. W. ROE, Manager.

The other circular was as follows:

British Nation Life Assurance Association.
Chief Office, 316, Regent-street, W.
London, 31st July, 1863.

Dear Sir,—It is announced to you by the accompanying letter from the Wellington Life Insurance Society, that an arrangement has been concluded for the union of the business of that society with this association.

Under the agreement, made between the British Nation and the Wellington Society, it is not necessary for us to trouble the policyholders to send their policies for indorsement by this association. Should you, however wish it, if you will forward your policy either direct or through the agent in your district, it shall be immediately (after the succeeding Thursday), returned to you indorsed, signed by three directors, and sealed with the seal of this association; or, if you prefer it, a new policy of this company will be issued in lieu of the one you now hold. But it is necessary for me to inform you that all the policyholders are perfectly secure under the renewal receipts, and that the terms and conditions contained in the policies issued by the Wellington Society remain unaltered by the transfer.

The subscribed capital of this association is upwards of a quarter of a million; the annual income is 170,000*l.*, and the invested funds (irrespective of capital), are upwards of 280,000*l.*

I would invite your special attention to the distinctive principles of the British Nation, which present a most powerful reason for the preference of assurers, and which will certainly gain business wherever they are carefully and perseveringly advocated.

The public appreciation of these principles may be seen by the great progressive increase of new business in each of the following years. . . . . .

The income from new bueiness is now at the rate of 25,000*l.* per annum.

Your position as a policyholder, I need scarcely remark, will be greatly improved by the arrangement now made. By the union of interests, and by the conduct of the joint business in one office, and by one official staff, a very considerable reduction of expenditure is effected, which must add considerably to the bonus, while the new business, large as it is at the present time, will be continually increased by the concentration of interest and income.

It may also be gratifying to you to know that the British Nation and the companies united with it have paid more than 3000 claims to policyholders, amounting with the bonus addition to upwards of a million and a quarter sterling.

Allow me, therefore, to express the hope that you will as a policyholder, do all in your power to uphold and increase the business by reverting to the subject of assurance among your friends, and (if it be not inconvenient to you) by rendering aid by introductions and otherwise to the agents in your district. You will thereby be promoting, not only the general prosperity of the institution, but by thus adding to the profit fund, you will be increasing the value of your own policy.

HENRY LAKE, Manager.

Mrs. Conquest received these circulars but took no notice of them. Her policy was not indorsed, nor was a new policy issued in lieu thereof. After the date of the circular, she paid her premiums to the British Nation Association, and accepted receipts from them until 1865, when the British Nation Association transferred its business to the European Society (*vide sup.*, p. 41), after this time she paid her premiums to the European Society and accepted receipts from them, the last receipts being in the following form:

No. 25,699.

European Assurance Society.
Premium £7 5s.
On the life of Mrs. Conquest.

Received the 16th June 1869, the sum above stated, being the amount of premium for the renewal of policy No. 39,561 for twelve months from the 22nd May 1869, according to the tenor of the said policy.

ROBERT NORTON } Directors.
MICHAEL QUIN }

Printed receipts for renewal premiums issued from the chief office and signed by two directors, will alone be admitted as valid.

In 1867 a bonus was declared by the European Society, and the following circular was sent to Mrs. Conquest:

Bonus Notice.
European Assurance Society.
London, W., April, 1867.

Policy No. 39,651.

Life of Miss E. Clare.

I am instructed by the Board of Directors to announce to you that a valuation of the affairs of this society up to the 31st Dec. 1865, has been completed, and that an allotment of reversionary bonus to that period has been made. I have great pleasure in informing you that the reversionary sum added to the above policy at this division is 2*l.* 8*s.* You will please attach this notice to

the policy as the official declaration of the bonus addition. The business is still rapidly increasing, and it is hoped that at each succeeding valuation the bonus will be materially augmented.

HENRY LAKE, Manager.

To Mrs. E. Conquest,
Or the person legally entitled to the policy.

Mrs. Conquest took no notice whatever of this bonus circular. Notwithstanding that the circular stated that a reversionary bonus of 2*l.* 8*s.* was added to her policy, that sum was appropriated as profits contemplated by the terms of the policy, so as to make it payable during the lifetime of the assured, and an entry was made in the books of the European Society that the policy was payable on her attaining the age of eighty-four.

In the winding-up Mrs. Conquest claimed to be entitled to prove on her policy against the Wellington Society. The official liquidator, on the other hand, contended that she had effected a novation with the British Nation Association, and then with the European Society, and that her claim must be against the European Society.

H. M. Jackson appeared for Mrs. Conquest, and in arguing her case distinguished between the principles laid down as to novation in this arbitration (*vide Coghlan's* and *Blundell's cases, sup.*, pp. 31 and 39) and in *Kennedy's case* in the Albert Arbitration (Reilly's Albert Reports, p. 5). [Lord WESTBURY.—Do you think there is any real difference between Lord Cairns and me as you have read it to me from *Kennedy's* case? Now just see whether I have got it rightly. If a company, on the occasion of transferring its business to another, sends a letter to a policyholder and tells that policyholder, by means of this transfer or as a consequence of this transfer you will receive from the transferee company very many advantages that you would not have had by your original contract, if the policyholder, receiving that, does nothing except this, that he goes and pays his premiums to the new company, Lord Cairns is inclined to regard it as an acceptance of the offer and promise of additional advantages contained in the circular, and, therefore, as an acceptance of the new company in lieu of the old. But then, you see, according to the marginal note, Lord Cairns went on to say and came to this conclusion: when there is no evidence that the new company was made either expressly or by implication the agent of the old company for receipt of premiums—and therefore he seems to have said, whenever you can deduce or infer an agency to a new company, payment to it shall not amount to evidence of novation. Have I rightly expressed it?] I read this from Lord Cairns's judgment, "But it appears to me that the burthen of explaining the apparent irregularity of the receipts, the apparent variance, the open variance between the payments stated in the receipts and the payments contemplated by the policy, lies on the person who produces these receipts. Far from offering any explanation, Mr. Kennedy is obliged to confess that there passed, before the payments which are evidenced by these receipts, that transaction to which I have referred, namely, the sending to him and the receipt by him of this circular. It appears to me that this circular containing an offer, and on the face of it stating that payment of premiums to the Albert would be proofs, as it were, of the acceptance of the offer, the moment a premium was paid in the manner invited by the circular, the contract became complete between Mr. Kennedy and the Albert on the one hand, and the termination, on the other hand, of the liability of the Family Endowment, became complete for want of any payment of premium to them." [Lord WESTBURY.—I do not differ from that.]

Napier Higgins, Q.C. and *Montague Cookson*, for the official liquidators of the European Society. —Mrs. Conquest received the amalgamation circulars; these were an offer of a new contract. She thereupon went and paid her premium to the new company, and thereby accepted the offer. Moreover, although she did not reply to the bonus circular, she did not object to the bonus, she acquiesced in it, and thereby she as much accepted it as if she had written to accept it:

Glazebrook's Case, Albert Arbitration, Reilly's Rep. 135;

Knox's Case, Albert Arbitration, Reilly's Rep. 132; 16 S. J. 673.

This bonus was one that she was not entitled to under the terms of her original policy, and therefore the acceptance of it showed that she was looking for payment to the European Society alone:

Re Medical, Invalid, and General Life Assurance Society; Spencer's Case, L. Rep. 6 Ch. 362.

Lord WESTBURY.—

It is a very lamentable thing to see how multitudes of innocent simple people are dealt with by these companies, and by the legal arguments that are supposed to be justly and rightly based upon the conduct of these companies. Now here we have a case that I should have imagined could not have admitted of any possibility of doubt. The Wellington Company unites its business with the British Nation. It sends a communication to its policyholders of the terms on which that union would proceed. They are first of all assured that the terms and conditions of their own policies issued by this society will remain unaltered. Now that is the governing assurance. Mrs. Conquest, therefore, holding a policy from the Wellington Company had a right to say, "By your representation to me, although this union will be carried out in the manner that you describe, the terms and conditions of my policy and your liability, therefore, on that policy, will remain unaltered." Now the same circular goes on to describe what would be certain benefits resulting from the union of the businesses, and those benefits the policyholders are told that they will have as the result of the union; not as the result of a union the cardinal principle and rule of which was that the terms and conditions of their policies should remain unaffected; but they are told that the union of companies increases business, and that the Wellington policyholders will have not only the security of the large annual income of the joint business, but it has been arranged that in all future bonuses they shall participate on an equality with all the other policyholders in the joint companies. If, therefore, in the progress of things, benefits in the shape of bonus were found to accrue to the policyholders in the conjoint companies, the policyholders of the Wellington company were to have the benefit thereof, and the benefit so received was not in any manner to prejudice or affect the terms and conditions of their policies. Now there is a union of business with the British Nation, the Wellington company ceases to carry it on, the British Nation carries it on—carries on the conjoint business. The direction and the agreement to carry on that business involves, of necessity, this: that the British Nation

were as agents of the conjoint companies to receive the premiums, and might give discharges therefor. If I give authority to my steward to receive the rents of my property, what matters it whether he gives a receipt for the rent in my name or in his own? If he gives it in my name, he is entitled so to do by the authority he has; if he gives it in his own name, he is answerable to me for what he receives in the character of my agent. Well now, first, I have had a great deal of argument founded on a great variety of cases with respect to which it is a painful thing to contemplate how much these innumerable reports contribute to the expenditure of time in courts of justice. There is not a single case that I have heard that has any bearing upon the facts of this case; and if there were a dozen having a bearing upon it, if the facts of this case admit of the plain, straightforward, rational interpretation that I give them, I would not permit that interpretation to be overborne or influenced by any number of decisions. Now, it is said that the British Nation Association received these premiums in its own name. It is true they did so. It is true that in so doing they acted in conformity with that agreement, of which they originally gave notice to their policyholders by the circular to which I have so often referred. What the policyholder did, therefore, in accepting the receipt of the amount, was in strict conformity with the request made to him in the original communication that was made to him by the Wellington and by the other combined. Well, then, that goes for nothing. Well, but then I am told, and this, it appears, is only for the purpose of bringing in a decision that it was supposed would influence the case—Nay, but Mrs. Conquest received a letter from the European Society, announcing to her that they had added to her policy a particular bonus, which was a bonus that she could not have expected to receive under the terms of her original policy, and therefore it is evident that in taking that benefit she had agreed to take the benefit of the new company and the new contract with that company in substitution for the old. Now, in the first place, the letter that gives her information that a sum of 2*l.* 8*s.* was to be added to her policy was a letter that she was not bound to have accepted at all, neither does she appear to have accepted it, because her original policy provided this—that the bonus should be applied in the appropriation of profits so as to give her a title, on attaining a certain age, to the accumulated profit that might accrue in the interim by virtue of that appropriation. That title contained in her policy, the terms of which were to remain unaltered, is disregarded, and omitted altogether in this circular, and the circular therefore tells her that the European Society had done something which they were not at all at liberty to do against her assent. Now she takes no notice of this letter; she did very well, I think, in not taking any notice of the letter. If a man writes to me a letter, and tells me that he has done something which he had no right to do, I am under no obligation to warn him that I do not accede to that letter. It reminds me of an Irish case in which a man wrote to a proprietor of land, and said, "I will give you £20,000 for your estate, and if I do not hear from you by a certain time, I shall consider that my offer is accepted." I do not know whether it was decided that that amounted to an agreement, but if it was decided that it did so amount, I think you will agree with me that the decision is not entitled to any considerable respect, But now if we regard this letter as one that Mrs. Conquest accepted by silence, did she thereby deprive herself of the right to her original policy? Why, she had a right to fall back on the terms of the circular addressed to her and to say, "I was justified in believing that this sum of money that you told me was to be added to my policy was a sum that arose in conformity with your own statement in your original circular in which you tell me—whilst assuring me that my policy should remain unprejudiced—you tell me that the Wellington policyholders will have not only the security of the large annual income of the joint business, but it has been arranged that in all future bonuses they shall participate on an equality with all the other policyholders in the conjoint companies;" and the letter intimates to her that that had been done, and that a valuation had been made of all the affairs of the Europeau, and that in that valuation a sum of 2*l.* 8*s.* emerged to her as her proportion, and in conformity, therefore, with this promise and this representation, she might well have allowed it to be added to the policy without in the smallest degree affecting the terms and conditions of the policy, and she had a right to treat this bonus as a profit accruing to the policyholders by virtue of the business of the Wellington Company having been transferred to the European. But in order to render absurdity more absurd, the argument, that is founded on this letter and the addition of the bonus, is nullified by the next paragraph of the case, because it appears from that paragraph agreed upon between the two parties here, that although they told her it was to be a reversionary bonus, yet they never gave her a reversionary bonus, but they took the 2*l.* 8*s.*, and, contrary to the terms of the letter which I am told she accepted, they added it to the policy by appropriating it as profits contemplated by the terms of the policy. And the letter, therefore, departed from by the company, their expressions corrected by what they did—I am told that the letter and her silence in not answering it are evidence of an assent to the letter, the company having, in fact, repudiated that very letter, and that, therefore, she shall be bound to take the new policy. It is a pain to me to see the manner in which the losses of these innocent persons, who knew nothing of it, are augmented by legal subtlety and legal ingenuity, and by the raising of every kind of opposition to their having the simple performance of the contracts which alone they understood and upon which they relied. Then comes that which is the fault of lawyers, and of judges, who are included under the name of lawyers, that subtle conclusions have been derived, and I am told that I must impute to these innocent people a variety of conclusions, and a large amount of knowledge, because certain deeds which they never could have got at to read are referred to in their policies and in their transfers, and therefore the knowledge of those deeds and of the construction thereof is to be imputed to them, and their rights are made to be dependent, not upon what they actually knew, but upon what they were assured, and upon what they might have attained to the knowledge of, if they had been so clever and ingenious as to perceive the possibility of its affecting

them, and if consequently they had come under the obligation so thrown upon them, and had made search in order to discover their actual legal position. All this is a matter of great pain, and therefore it is that I repeat again, I will not transfer a man, who is a creditor, from one person to another and bind him to take that course, unless I have most unequivocal proof that it was done with his knowledge, and that he has subsequently assented to it, and that with competent information on the nature of the case he has agreed to accept the new debtor instead of the old. Mr. Jackson, you will take your order and have your costs from the official liquidators of the European Society. When the Wellington Society is being wound-up, and they are officers of that society also, they may apply to me to have the costs out of the Wellington Society's estate.

Solicitor for Mrs. Conquest, *W. Stimson.*

Solicitors for the official liquidator of the European Society, *Mercer* and *Mercer.*

Wednesday, Jan. 22nd.

West's Case.

Company—Amalgamation of companies—Winding-up — Contributory — Liability in old company having been limited, claim by one, who accepted shares in the new company in respect of shares in the old, that his liability was still limited.

The B. company, being a company of limited liability, transferred its business to the E. Society, each shareholder in the B. Company taking two shares in the E. Society, in respect of each 1l. paid on his shares in the B. Company, and the E. Society taking the business of the B. Company, together with the liabilities subsisting at a certain date. A shareholder in the B. Company, who had thus received E. Society's shares, and whose name remained on the register of both companies, was in the winding-up placed on the lists of contributories to both companies. He claimed that, inasmuch as his original liability in the B. Company was limited, the whole of his liability to the two companies ought not to be extended beyond that limit; and, further, that he was not to contribute to the E. Society until that society had indemnified him against his liability to contribute to the payment of the liabilities of the B. Company.

Held, that these contentions could not be considered until all the creditors of the E. Society had been paid.

The British Nation Fire Insurance Company, Limited, was incorporated by registration under the Companies Act 1862, as a company limited by shares. The nominal capital of the company was to be 1,000,000*l.*, divided into 50,000 shares of 20*l.* each.

In 1865 negotiations were entered into for the transfer of its business to the European Assurance Society. The agreement between the two companies was that the interest, business and goodwill of the British Nation Fire Company should be transferred to the European Society as from the 30th June 1865, and that the company should cease to carry on business, that the European Society should take all risks in force on the 30th June 1865, and that all premiums received since that date should be handed over to the European Society, together with the risks and liabilities thereunder; that the British Nation Fire Company should pay to the European Society 12,000*l.*, and in consideration thereof and of the goodwill of the business, the shareholders of the British Nation Fire Company should be entitled to receive two shares of 2*l.* 10*s.* each in the European Society, upon which 10*s.* 6*d.* should be deemed to have been paid, in respect of each 1*l.* paid by them on shares in their own company. On the 11th and 26th Oct. 1865, this agreement was approved of, and confirmed by extraordinary general meetings of the shareholders of the British Nation Fire Company.

Mr. West held twenty-five shares in this company, and he now alleged that he attended the meeting of the 11th Oct. 1865, and opposed the resolution as to the agreement to transfer the business; and that at the meeting the board of directors was asked whether the transfer of the business would affect the liability of the shareholders, and that the answer given was that the liability would remain the same as before.

In Feb. 1866, he sent to the European Society the certificates of his twenty-five shares in the British Nation Fire Company, and received in exchange certificates for 250 shares in the European Society; he further executed a covenant to abide by the provisions of the deed of settlement of the European Society.

His name being on the register of both companies, he was in the winding-up placed on the list of contributories to both companies.

He now contended that his liability to the creditors of the European Society should be limited to the sum of 187*l.* 10*s.*, on the ground that on the transfer of the business of the company to the society it was stated that the liabilities of the shareholders in the company would not be increased, and that he had paid to the company and the society together the sum of 312*l.* 10*s.*, his total liability to the company never having exceeded 500*l.* He further contended that, according to the true construction of the agreement, under which the transfer was made, the European Society agreed to indemnify the shareholders of the British Nation Fire Company from any claims made against them with respect to the liabilities existing or to arise from the business transacted by the company up to the 30th June 1865, and up to the time of the company ceasing to carry on business; and that as he would be liable to pay calls to the British Nation Fire Company in respect of risks existing on the 30th June, 1865, and up to the time of the company ceasing to carry on business, he could not now be required to pay up the balance stated to be due upon his shares in the European Society, until the European Society should have satisfied the liability which he was under to the British Nation Fire Company. And moreover, that he would be entitled to prove as a creditor against the European Society for all moneys which he might be called upon to pay to the British Nation Fire Company in the event of the European Society failing to indemnify him from his liabilities to the British Nation Fire Company.

Willis appeared for Mr. West.

Montague Cookson for the official liquidator of the European Society.

Lord Westbury:—

It is very hard on a gentleman who to-day is the owner of shares in a company, which is transmuted into another company, and in respect of the first

holding is made the holder of shares in the transmuted company, and then, after a certain lapse of time, finds himself charged with a double liability, with his original liability, and also with that which he believed was a substituted liability in lieu of the original liability. That is one part of the case which is very painful and very difficult to make intelligible to ordinary persons. I have had a great number of letters, in which the writers complain to me and say,—"we considered that we were to stand as members of the new company and were wholly exonerated from the old." Unfortunately they were not advised that by the state of the law there could not be that exoneration until their names were removed from the register of the old company. They permitted that to remain unaltered, and unfortunately the law inflicts upon them the consequence of remaining registered shareholders, and they also permit themselves to stand in another and second capacity upon the register of another company. There, again, they are fixed by the law and bound by the consequences of that registration. They cannot be relieved. It is a consequence of ignorance of the law; a consequence of want of attention to the necessary formalities of exoneration. These in the first company would be, of course, the removal of their names from the register of that company. I commiserate such cases very much, but I have no power to relieve. It is one of the innumerable dangers from neglect in institutions like these companies, which are subject to a very artificial system of law, difficult to be understood, full of pitfalls, but to be perfectly well understood and entirely followed on the occasion of any dealing. That is one part of this case upon which I cannot relieve parties. But then this gentleman comes here and says, "I shall be entitled to an indemnity by virtue of the engagement between the two companies that the European Society will take the business with all the risks attendant upon that business." I will not say anything to discountenance that contention; the time has not arrived; and I could not give effect to that contention without, in some manner or other, reducing the liability of this gentlemau upon his shares in the European Society. That I cannot do; but when all the engagements consequent upon that position are fulfilled, if there should be—which is a thing that will be realised only in the Greek Kalends—any possible surplus of property not belonging to, or not required for, the creditors, then it may be possible that that may be subject to claims of this kind. It is idle to say that that contention can be entertained at the present moment. Then he puts it in another light; he says:—"I was assured that my liability would not be increased; my liability will certainly be increased; therefore may I not claim in respect of that augmented liability?" I cannot tell whether it will or will not; but, if it is increased, I cannot give effect to any claim for reduction of that augmented liability, because it is a claim that can only be, as I have said before, admitted for a moment or considered for a moment after all the liabilities, consequent on his being the holder of 250 shares, have been completely settled. I must, therefore refuse the present application, and with costs.

Solicitors for Mr. West, *Le Riche* and *Son*.

Solicitors for the Official Liquidators of the European Society, *Mercer* and *Mercer*.

Nov. 2, 1872; *Jan.* 21 *and Feb.* 3, 1873.

Barnes's Case.

Life assurance company—Amalgamation of companies—Novation of contract—Annuity—Attempt to show that the liability of the old company was annihilated on the transfer of business, under peculiar provisions in the deed of settlement and the annuity contract.

The deed of settlement of the I. Life Assurance Company, contained a provision whereby the company might be dissolved, and the directors should thereupon satisfy all the immediate claims on the company, and obtain from some other assurance company an undertaking to pay the remainder of the claims as they should arise, and should then transfer to that company so much of the property of the company as should be agreed upon as sufficient, with the future premiums to enable them to comply with this undertaking; and if any property should remain after answering these purposes, then it should be distributed among the shareholders, and, notwithstanding the dissolution, the deed was to remain in force until all claims should have been "satisfied and provided for as aforesaid," &c., and should continue in force so far as it might be necessary for winding-up the affairs of the company, &c.

In 1855 *the I. Company passed resolutions for dissolving itself, and it transferred its business and assets to the E. Society. An annuity contract had been granted to C. by the I. Company, whereby the property of the Company "remaining undisposed of," was to be liable for the payment of the annuity.*

In 1872 *an order to wind up the I. Company was made on the petition of this annuitant, who since the amalgamation had been receiving the instalments of her annuity from the E. Society. B., a former shareholder and director in the I. Company, was appointed by the Vice-Chancellor to represent that Company on the hearing of the petition. He now applied to the arbitrator to have the winding-up order discharged, on the ground that the annuitant was no longer a creditor of the I. Company, being bound by the deed of settlement, which, it was contended, provided for the absolute dissolution and destruction of the Company, so as to release it from all obligations; and the I. Company having been dissolved in this way, and its liability transferred to the E. Society.*

Held, that this was not the true interpretation of that deed; and further, that, if it had been, the company could not make use of any provision in its deed of settlement, so as to derogate from any grant by it of an annuity.

On its being contended that the annuitant, by her acts in accepting payment from the E. Society, and sending them receipts and certificates, in which the annuity was referred to as "payable by the E. Society," had transferred the liability to the E. Society, it was

Held, that there was no such transfer of liability.

The grantee of an annuity-contract takes it with full notice of the deed of settlement and constitution of the grantor Company.

Carr's case (33 *Beav.* 542) *and* Mosley's case (*Albert Arbitration Min. p.* 953) *distinguished and considered.*

This was an application to discharge an order of Malins, V.C., under which the Industrial and

General Life Assurance and Deposit Company was ordered to be wound-up.

The company was established under a deed of settlement dated the 18th Dec. 1849, and was duly registered under the Joint-stock Companies' Registration Act (7 & 8 Vict., c. 110). The deed contained the following provisions :—

Clause 42 :

That two successive extraordinary general meetings, specially called for the purpose, shall have full power to make new laws, regulations, and provisions for the company, or to amend, alter, or repeal, either wholly or in part, all or any of the laws, regulations, and provisions of the company. Provided such new, amended, or altered laws and provisions do not extend to amend, alter, or repeal all or any of the laws, regulations, and provisions established by these presents for confining the individual responsibility of each proprietor or other holder of shares in the capital of the company to the amount of the shares held by him or her, and subject in all cases to the provisions and resolutions of the Act, 7 & 8 Vict. c. 110, and these presents or other special authority.

Clauses 44 and 190 provided that the company might be dissolved, after resolutions passed to that effect by two extraordinary general meetings.

Clause 191 :

That immediately upon the dissolution of the company, the board of directors shall, out of the funds or property of the company, pay and satisfy all the immediate claims and demands on the company arising from assurances or other contracts or engagements, and shall obtain from some other assurance company or from the directors or managers of some other assurance society, or company, an undertaking to pay and satisfy the remainder of the claims and demands on the company, arising from assurances, annuities, or other contracts or engagements, when and as the times for the payments and satisfaction of the same shall respectively arrive, and shall cause to be transferred to some other assurance company or to some of the trustees or directors of such other assurance society or company, so much of the funds or property of the company, as shall be agreed upon between the contracting parties as will be sufficient, with the premiums that may become payable in respect of all their existing policies, to enable the society or company, from whom or from whose directors or managers the undertaking shall have been obtained, to comply therewith, and shall make such arrangements with the said assurance company or the said directors or managers in regard to their said undertakings, as the board of directors shall in their discretion think fit, and shall cause to be done and executed all such acts, deeds and things, as in the opinion of the board of directors shall be necessary or advisable for carrying the same engagements into effect; and if any funds or property of the company shall remain after answering the purposes aforesaid, shall cause the same, or so much thereof as shall not consist of money, to be sold, got in, or otherwise converted into money, and shall cause the moneys arising from the said remaining funds or property, or of which the same shall consist, to be paid and distributed at such time or times as they shall think fit, to and amongst the proprietors and other holders of shares in the temporary capital of the company and the members, according to their respective rights and interests therein; and, notwithstanding the dissolution of the company, these presents and the provisions herein contained, and all powers, privileges, rights and duties of the proprietors and other holders of shares and members, including the powers to call and hold extraordinary general meetings of the proprietors and members, and the powers to call for and enforce the payment of further instalments on shares, shall, until all claims and demands shall have been respectively satisfied and provided for as aforesaid, and until a final division shall have been made of the residue (if any) of such moneys as aforesaid, remain and continue in full force, so far as the same may be necessary for winding up the concerns of the company, and for enabling the Board of Directors to dispose of the funds or property of the company, and to satisfy and provide for such claims and demands, and to make such payment and distribution as aforesaid.

In 1855 negotiations were entered into for the dissolution of the Industrial Company, and the transfer of its business to the European Society. On the 23rd Oct. and the 13th Nov. 1855, extraordinary general meetings of the Industrial Company were held, and it was resolved :

That in accordance with the recommendation contained in the directors' report, the Industrial Company be, and is hereby dissolved.

On the 6th Nov. 1855 was executed the "deed of amalgamation" with the European Society. This deed recited that the two companies, with a view to confer a mutual benefit, had lately determined to combine and amalgamate their respective businesses; and, in order to carry such purpose into effect, it had been agreed that the Industrial Company should be dissolved, and that the business, assets, and property of the Industrial Company should be taken over by the European Society upon the terms thereinafter contained. And it was witnessed that the Industrial Company and the European Society covenanted with each other that the Industrial Company should forthwith take such further or other measures as were necessary, or might be deemed expedient, in order to carry into effect and confirm the dissolution of the company with all practicable speed. That immediately upon the dissolution of the Industrial Company, the whole business, assets, and property of the company should be consolidated and amalgamated with the business, assets, and property of the European Society. That the proprietors of shares in the capital of the Industrial Company should receive in exchange for each of their shares, on which 10*s.* had been paid, a share in the European Society on which 10*s.* should be deemed to have been paid. And that the European Society would pay and satisfy all claims and demands on the Industrial Company arising from assurances, &c., or other contracts whatsoever, when and as the times for the payment and satisfaction should arise, and would at all times indemnify the Industrial Company in respect of such assurances, &c., or other contracts. In accordance with the provisions of this "deed of amalgamation," all the shareholders of the Industrial Company, except seven, exchanged their shares for shares in the European Society, and property of the value of 5000*l.* was transferred to the European Society, and the Industrial company ceased to carry on its business, which was thenceforth carried on by the European Society.

On the 4th Sept. 1855, an annuity contract had been granted by the Industrial Company to Mrs. Crabb, whereby it was agreed

That the funds, and other property of the company, shall be subject and liable, according to the provisions of the deed or deeds of settlement of the company, to pay at the office of the company, to Elizabeth Crabb, or her assigns, the annuity of 27*l.* 15*s.*, in every year during the continuance of her life. . . . Provided always that the capital stock of 100,000*l.* sterling, or so much thereof as for the time being shall have been subscribed, and the other stocks, funds, securities, and property of the company remaining, at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands, in pursuance of the trusts, powers, and authorities contained in the said deed or deeds of settlement, shall alone be liable to answer and make good all claims and demands upon the said company, under or by virtue or in respect of this policy, and all other policies.

No payment was made to Mrs. Crabb in respect of her annuity before the date of the amalgamation.

All the instalments of her annuity were paid to her by the European Society, and she gave receipts to them in the following form:—

Received of the European Assurance Society 6*l.* 18*s.* 9*d.*, being the amount of one quarter's payment of an annuity due to me on the 4th March 1869.

The certificates she sent as to her identity were in the following form:—

I do hereby certify that Elizabeth Crabb, of Coggeshill, &c., and on whose life an annuity is payable by the European Assurance Society, under a deed numbered 16,225, appeared before me this day at Coggeshall, that I am satisfied as to her identity as the party whose signature is hereunto affixed. . . .

However, she never received any copy of the report recommending a dissolution of the Industrial Company, nor any notice of the intention to transfer, nor of the actual transfer of their business.

On the 7th June 1872, Mrs. Crabb was held by Vice-Chancellor Malins to be a creditor of the Industrial Company on her annuity contract, and an order was made, on her petition, to wind up the company.

Mr. Barnes, who had been a shareholder and director of the Industrial Company, and had, on the amalgamation, taken shares in the European Society in exchange for his shares in the company, was appointed by the Vice-Chancellor to represent the Industrial Company at the hearing of Mrs. Crabb's petition. Mr. Barnes now applied to have the winding-up order discharged.

The case was opened on the 2nd Nov. 1872, and stood over for the purpose of making Mrs. Crabb a party to the application.

Jan. 21.—*Fischer*, Q.C. and *Bailey* for Mr. Barnes.—The annuity contract ought to be read as if it contained on its face the 191st clause of the Industrial Company's deed of settlement. [Lord Westbury.—I agree to do that.] The directions of this clause were strictly followed, and a *bonâ fide* provision having been made for meeting future claims and demands, the company was effectually dissolved and annihilated. Moreover, the terms of the policy were, that the annuity was charged on the property of the company remaining undisposed of, and the property of the company was duly disposed of to the European Society. [Lord Westbury.—Even if the words were as you want me to hold them to be, it would be the most monstrous disposition in the world; the very charge, made by the company having such a power, would be a suspension of the power, and the power could only be executed subject to the charge. There are no such words here; "disposed of" here does not mean an assignment to another company of the uncalled-for capital of the assignor company, but it means that the charge shall not give any right to recall property, which has been already received and actually applied and disposed of. If you could read to me out of Mrs. Crabb's annuity contract a proviso containing these words, "Provided always, and it is hereby declared that the grant of the annuity hereby made shall be subject to the absolute right and power of the company to call in, receive, spend, dispose of, or assign all the property it has, and all the property it may have, without the necessity of making any provision for the payment of this annuity," then I should hold that Mrs. Crabb must follow the property charged, and could have her annuity subject only to the contingency of her finding a part of that property undisposed of.] There are two cases in which the liability of a company was held to be terminated in this way without any concurrence on the part of the policyholder.

Re The Waterloo Life, &c., Assurance Company, Carr's case, 33 Beav. 542;

Mosley's case, Albert Arbitration Min., p. 953.

Further, Mrs. Crabb by her acts accepted the European Society in exoneration of the Industrial Company. She accepted the instalments of her annuity from the European Society, and she gave them receipts. The certificates of identity that she sent referred to the annuity as payable by the European Society. In *Dale's case* (Albert Arbitration, 15 S. J. 886; Reilly's Albert Rep. 11) Lord Cairns based his decision partly on the certificates. [Lord Westbury.—I will take it for granted that Mrs. Crabb understood what she was doing; but I am perfectly clear that by the anterior dealings between the two companies the European got authority from the Industrial to receive the premiums on the policy, and I am satisfied, also, that Mrs. Crabb might well have received her annuity from the assignee of the Industrial without any conclusion being warranted by that fact that she meant to look to the assignee, and the assignee alone.] This case is analogous to the case where a partner in a firm has died, and a creditor has dealt with the surviving partners for several years; he cannot then make a claim against the deceased partner's estate:

Brown v. *Gordon*, 16 Beav. 302.

Lord Westbury.—In all those cases the creditor continues to deal with the only persons who are liable to him at law; he may also have had in equity a right to follow the assets of the deceased partner, for that was an equitable right. He relies on his legal right, and continues to be satisfied with that for a number of years. Nothing is better settled than that an auxiliary right in equity, if not enforced within a reasonable time, must be considered as barred by lapse of time. That has no application here, because here the original debtor was bound at law; there the debtor is bound by virtue of the transfer, and if the party receives the money from the transferee, as it was the intention of the transferor that he should, it does not follow that his legal right is released or extinguished. There is a great difference between a legal right and an equitable right.

Napier Higgins Q.C., and *Montague Cookson*, appeared for the official liquidators of the Industrial Company.

Edlin Q.C., and *Henderson*, for Mrs. Crabb.

Lord Westbury—

I shall reserve for consideration that part of the case which refers to the interpretation to be put upon the 191st clause of the deed of settlement and upon the point that it gave power to transfer the annuity creditor to the society, with which her original debtor amalgamated, and that she must therefore follow that company and can no longer claim from the other. I will, out of deference to the cases cited, reserve that point for consideration; and if I find it is one that ought to be further considered I will then call upon the counsel for the official liquidators to answer the argument.

Monday, Feb. 3.—Lord Westbury.—Mr. Higgins, out of deference to the learned judges who decided *Carr's case* (33 Beav. 542), and *Mosley's case* (Albert Arbit. Min. p. 953) (although I have some

reason to believe that *Mosley's* case may be reheard), I will hear what you have to say on these two cases; but on the other portion of the case I shall not trouble you.

Napier Higgins.—In those cases there was a valuation of the property of the transferor company so as to ascertain its sufficiency to meet the liabilities transferred. Here, on the other hand, there was no such valuation of the property and of the liabilities, so as to show that the property handed over was sufficient to meet those liabilities; but, on the contrary, there was rather an amalgamation of the business of the Industrial Company with that of the European Society. This constitutes a material difference between those cases and this. However, it does not appear that the decisions in those cases were well founded. [Lord WESTBURY.—It is quite clear that a valuation was intended by the 191st section, because there it is said, "If any funds or property of the company shall remain after answering the purposes aforesaid," which purposes aforesaid are to ascertain the amount of the property and the amount of the liability, and then it is provided that, if any portion of the property remain after setting apart a sufficient provision for the liabilities, that should be distributed.]

Lord WESTBURY:—

It is necessary to state, in the first place, in what form this case comes before me. Previous to the passing of the Arbitration Act, and on the petition of Mrs. Crabb served on certain parties, of whom Mr. Barnes was one, the Vice-Chancellor, Sir Richard Malins, made an order for winding up the Industrial Company. That order evolved two things as being established in the mind of the Vice-Chancellor. First, that this Industrial Company was a company still in existence and not defunct; secondly, that Mrs. Crabb was a creditor of that company; and on the combination of those two things, established in the mind of the learned judge, he founded the winding-up order. Now, one of the parties to that order, Mr. Barnes, comes before me and contends for what, in effect, would discharge the Vice-Chancellor's order. He contends, though he did not there contend any such thing, that there is no such company *in rerum naturâ* as the Industrial Company; that the Company is dead and gone; dead absolutely; dead to its liabilities, not merely dead to its shareholders. And, therefore, I am told now by Mr. Barnes that this lady, Mrs. Crabb, is not a creditor of that company, that the company is gone to its account and cannot be cited any more. Now Mr Fischer contends that this Industrial Company, having granted a variety of policies and annuities, which were charged on all its property and all its claims on its shareholders, was founded on a deed which gave it the power, at any time when certain formalities were complied with, of dissolving itself absolutely, annulling its own contracts, transferring those contracts, behind the backs of its creditors, to some other company not chosen or assented to or acquiesced in by the creditors, relieving itself from the obligation of every grant, and leaving the creditors the power only of pursuing, if they could, the transferee company, which in the meantime has taken possession of all the property pledged to the creditors without any obligation to set it aside, without any obligation to invest it, with full liberty to spend it, with full liberty to laugh at the obligations contained in the contracts of the original company, and leaving the creditors in that predicament of absolute helplessness. Now it is contended that that is agreeable to reason, provided it be stipulated. The stipulation certainly, even if it be found, would not be agreeable to reason; but if the stipulation can be found, why then, I suppose, one must only lament that people were foolish enough to deal with a company that had such a power. But if the power be one destructive of every contract, if the power be one that would lead at once to an unnatural annihilation of every engagement, I suppose all would admit that one should be very slow in arriving at the conclusion that anything so monstrous, anything so unreasonable, could be found in any deed of settlement, or in the constitution of any company. That being Mr. Fischer's proposition, we will consider in detail some of the material points that have been argued before me; and the first proposition is, that all these annuities, all these contracts by the Industrial Company, were taken with the knowledge of the provisions in the deed, and that therefore it was competent to the company to carry out to its full extent the provisions in the deed as against its own creditors, the persons to whom it made grants for valuable consideration. Now, I agree that an annuitant takes with notice; but I deny that the company can use those provisions, if its own grant is at variance with the liberty to use them; that is to say, if the use of them would derogate from the grant made by the company. Now it is abundantly clear that if the society grant an annuity to John Smith, and charge all its property with that annuity, the company is bound to the extent of that grant, and that it cannot make a wanton use and application of the property so bound, in such a manner as to release itself from all its contracts and obligations to John Smith, and to send him precariously to seek payment of the annuity at the hands of some other person selected by his grantor, the original company, without any communication with him. I desire it to be understood that, although it is perfectly true that the grantee of a company takes with full notice of the settlement and the constitution of that company, yet it is equally true that the company, having made that grant, cannot use any power or any authority in such a manner as that it should have the effect of releasing the grantor from his obligation. Therefore let that be considered in all arguments before me as so qualified. The grantee has notice of the deed of settlement, I admit; but the grantee is at liberty to say with respect to any particular power, "It cannot be used or enforced against me without derogating from your grant to me, and, therefore, your right to use that power or authority is, so long as my contract continues, suspended." That was well illustrated by Mr. Higgins, who referred, I think, to the 42nd clause of the deed of settlement, which gave the company a general power to alter even its own constitution. It might have reduced its liabilities. Therefore he asked the question very pertinently—Could the company, after the grant of these annuities, use that power, and take away the security from the annuitants? Certainly not; and, to my surprise, it is contended that that was the thing intended. They handed over the whole of their property after they had charged it, to another company, that that company might deal with it in any manner that they pleased; they did not bind that.

company to their own creditors in a manner that the creditors could have enforced, but were content to commit all the property, which they had so bound, to the discretion of the other company with whom they dealt, to spend it, squander it, to apply it in any manner they pleased; and they took from that company no provision for the creditors, but nothing in the world more than the common covenant with themselves that the transferee should indemnify the transferor. But now we come to the deed of settlement, for the purpose of seeing whether anything so monstrous as that which is contended for is found in it, in the sense in which the words of the deed have been interpreted by Mr. Fischer. Nothing is better settled in law than this, that if a partnership be bound—and a company is a partnership—to a creditor, although the partners *inter se* may proceed to dissolve their partnership, the dissolution is of no avail as against the creditors. Consequently, the common observation by lawyers is this, the partnership, though dissolved *de facto inter socios*, continues in law until the obligations of the partnership are discharged. And a familiar illustration is given of it in this way: I lend money on bond to A., B., and C., who are partners; two months afterwards A., B., and C. dissolve partnership; but if I have to sue them on the bond, I sue them in a court of justice as A., B., and C., partners, which they are until my debt is paid. That arises, no doubt, from the joint contract. These, then, being the ordinary rules, which approve themselves, I think, to every understanding, we come to consider this deed. Now these deeds of settlement contain provisoes for the dissolution of the Company, and they are powers which admit of different kinds of things; they admit of an union, or what has been called an amalgamation with another company; there the two bodies remain still independent and distinct, although by virtue of this union, or rather this joint contract, they are thenceforth partners together in the undertaking of the business they pursue. They permit also another thing, namely, that one company should cease to carry on business, should hand over that business to another company upon terms provided between the two for the satisfaction to the first of what it so hands over, and that is commonly called by the term "amalgamation." Well now, in this deed of settlement there are powers to carry this into effect, and of course it is obvious that in putting in a power of this kind, the shareholders of the company, in whose deed of settlement it is found, would be very anxious indeed to take some security to themselves, before their property was handed over to another company. And the framers of the deed and the men who entered into the engagement, were, therefore, very careful to clog and fetter the power of transfer with such conditions as were deemed sufficient and necessary for the security of the shareholders of the first company. Well, now, what does it proceed upon? Plainly upon this: The shareholders of the first company would say, "We have contracted a variety of engagements; if we part with our property and part with our business, those engagements will continue." And it is upon the foundation and basis of there being such engagements, and that they will have vitality and force after the transfer of the business by one company to the other, that these stipulations rest. Now, if they are of that nature, they involve this, that after the transfer, the liability of the shareholders of the company itself to the creditors will remain. It is absurd, therefore, speaking with great respect, to say that such a power contemplated the absolute annihilation of the company, and its release from all its engagements. It contemplated no such thing. It is called into being by the consideration of the fact that the creditors' rights would remain, and by the apprehension of what would be the consequences of those rights, if, upon the occasion of this transfer, proper security were not taken to the shareholders of the transferring company against those engagements. So far, therefore, is it true that the provision contemplated and provided for the absolute dissolution of the Company—that is, dissolution in the sense of becoming defunct and released from its obligations—that there is not a word in the proviso, that does not contemplate the very opposite, and is intended to guard the parties against the consequences of handing over their property without security for its application. Now that is manifest on every part of the deed, namely, it is said that the directors of the company contemplating dissolution shall obtain from some other assurance company or from the directors or managers of some other assurance company an undertaking to pay and satisfy the remainder of the claims and demands on the company arising from assurances and so forth. The "remainder" means the remainder of their contract obligations which will not be discharged by the money in hand, which is directed to be first applied. Well, now, what would be the plain duty of the directors under this? It is said that they "shall transfer to the transferee company or to trustees of some other such company so much of the funds or property of the company as shall be agreed upon between the contracting parties"—that is, between the two companies—"as will be sufficient with the premiums which may become payable"—that is, the annual income in respect of all existing policies—"to enable the society or company, from whom or from whose directors the undertaking shall have been obtained, to comply therewith." Now, can any man, who understands the meaning and force of language, fail to observe that here the stipulation is that out of the property of the transferring company there shall be set apart enough to answer its liabilities, taking into consideration, with the property so set apart, the income derivable from the premiums on the policies transferred? Now that would be a reasonable thing; but I agree, if that were done, the creditors, *nolentes volentes*, would be compelled to accept it; but I do say that that is a reasonable interpretation of the terms of the deed, and a reasonable condition that ought to be complied with before a dissolution of the company *inter socios* should be made, and before the directors should attempt to transfer the property to another company. Well, now, if I were to permit for a moment the contention that this proviso contemplated absolute dissolution—by absolute I mean dissolution *in omnibus*, as against creditors as well as partners—if I conceded that, I should then say, "But were the conditions complied with?" And the conditions obviously were that there ought to be a valuation of the liabilities of the transferring company, and an ascertainment of the property of the transferring company, and

so much of the property secured as with the premiums would answer the liabilities of the transferring company. Nothing of the kind was done here, and unless it had been done, and *bonâ fide* done, and wisely done, according to the just judgment of the directors, the power of dissolution would not arise. But it is an idle thing even to rely upon that, because it is palpable from the rest of the case that dissolution, annihilation in the sense contended for by Mr. Fischer, is utterly excluded. For after you take the first part of the clause, and you come to the hypothesis that that has been complied with, and that property has been set apart apparently sufficient to answer the liabilities, the contingency is provided for of its not proving to be sufficient, and it is a contingency that necessarily involves the idea of the continued existence of the society, of its being resuscitated for all the purposes of its business, and for the purpose of answering its liability; and, therefore, instead of its being a defunct thing, emancipated from the creditors, and altogether discharged, in this extraordinary way, of the contracts that it had made—instead of that, we find a comparatively rational course for the benefit of the shareholders. "We will not part with our property altogether whilst our liability continues, but if you can provide for the liability out of the portion of the property transferred, you may make the transfer, and the rest is to be paid and distributed to and amongst the proprietors and other holders of shares in the temporary capital of the company"—that is the temporary capital of the transferring company. And then comes the clause which utterly destroys the contention so warmly insisted upon. "Notwithstanding the dissolution of the company"—that means notwithstanding the dissolution *inter socios* —"these presents and the provisions herein contained, and all powers, privileges, rights, and duties of the proprietors and other holders of shares and members"—that is in the transferring company—"including the powers to call and hold extraordinary general meetings . . shall, until all claims and demands shall have been respectively satisfied and provided for as aforesaid, and until a final division shall have been made of the residue of such moneys, remain and continue in full force." Now, that is until after actual payment, or until after such a provision as would amount to satisfaction; nntil that has been done with regard to every liability and every contract—there is power to rehabilitate the company with all the powers and provisions contained in the deed of settlement, and call it into operation, in order that it might be made amenable to those debts and contracts which are found to be still unsatisfied and unprovided for under the antecedent part of the deed, which requires that provision shall be made. Now, the thing to my mind is as clear as it is possible for anything to be, and this interpretation is perfectly consistent with what is reasonable and right and might be expected, but utterly inconsistent with the extraordinary proposition that a company, after it has covered itself with debts, and incumbrances, and contracts, is at liberty, by this proceeding behind the backs of its creditors, to sweep away its property, to sell it out and out, to attack those creditors and cut the tie between themselves and the creditors, and hand over the unfortunate creditors, stripped and defrauded of everything to which they trusted, to the hands of another company, without even taking the contract between that company and the unfortunate creditors who are so committed. Now, I am told that these contentions have been found not so monstrous as they appear to be, and that they are sanctioned by two decisions to which I have been referred. I could not subscribe to the authority of any judgment that pronounced distinctly for Mr. Fischer's proposition. Now, with regard to *Carr's case* (*ubi sup.*), there are indications in it that a great deal more was done than appears to have been done here. I hope that that was so. If it was so, as appears to be the case, it distinguishes the case from that which is before me—not that I should accept it even then. With regard to the other case that came before Lord Cairns (*Mosley's case, ubi sup.*), I have reason to think that his decision was founded upon the fact of property to a very considerable extent having been handed over in such a manner as to be made available to the creditors. I have also reason to think that that case may be reheard. But putting those things aside, if they are not well founded, I class that case with *Carr's* case, before the Master of the Rolls, and I must, with very great respect to those learned judges, refuse to adopt any such conclusions, if the effect of adopting them would be to make me submit to the proposition that has been made before me. I have no difficulty, therefore, in pronouncing that the Vice-Chancellor was right. Probably I ought not to have admitted this argument by one who was a party to that order. I have no difficulty in holding that Mrs. Crabb is still a creditor of the Industrial Company, and that the Industrial is a living and existing company, and has been properly made the subject of a winding-up order. I have no hesitation in making Mr. Barnes pay the costs of this experiment. I hope the decision may be a warning to prevent other speculations of this kind being brought forward. Whether that be so or not, I dismiss the application.

[The case having been brought on by arrangement, the costs of all parties were ultimately allowed out of the assets of the Industrial Company.]

Solicitors for Mr. Barnes, *Chester* and *Co.*

Solicitor for Mrs. Crabb, *Chas. Harcourt.*

Solicitors for the official liquidators of the Industrial Society, *Mercer* and *Mercer.*

Monday, Feb. 3.

SIMPSON'S CASE.

Company—Winding-up—Contributory—Bonâ fide transfer—Misdescription of transferee—Esquire —Gardener—Sheep-farmer—Transfer set aside on account of misrepresentation as to occupation of transferee.

The deed of settlement of a company provided that a shareholder might transfer his shares after approval of the proposed transferee by the directors, and the notice of the wish to transfer was to contain "the full name and profession or calling," &c. of the proposed transferee. S. held 2000 *shares, and at first endeavoured to transfer them to a labourer, who was described in the transfer notice and the transfer as an Esquire. The company raised the objection that the result of their inquiries into the station in life of the proposed transferee was not satisfactory. On subsequently abandoning this transfer, a notice was*

sent to the society of a wish to transfer part of the shares to a man described as a "gardener," and the remainder to another, described as a "sheep-farmer." The proposed transferees were approved of by the directors, and the transfers executed and registered in April 1870. *It turned out that the one transferee was a working gardener earning* 15*s. a week, and the other a shepherd earning* 18*s. a week.*

In the winding-up of the society in 1872 *it was*

Held, that the original shareholder must be placed on the list of contributories, the misrepresentation as to the occupation of the proposed transferees being sufficient to lull the directors to sleep, and prevent their ascertaining the real facts.

THIS was an application to place the executors of Sir James Y. Simpson on the list of contributories to the European Assurance Society.

It was provided in the society's deed of settlement that a shareholder, who wished to transfer his shares, should send to the society a notice of his wish, and should describe in the notice "the full name and profession or calling, and place of abode of the proposed shareholder," and on the approval of the proposed shareholder by the directors, he might transfer his shares: (Clause 96: *vide sup.* p. 11).

In Sept. 1869 Sir James Simpson was the owner of 2000 shares in the society, and employed Mr. Stewart, a broker, to get rid of the shares. On the 9th Sept. 1869 Mr. Stewart sent to the manager of the society a notice of Sir James Simpson's wish to transfer the shares to "Mrs. Helen Henderson or Taylor, wife of William Taylor, Esquire, contractor," or half to the husband and half to the wife. It turned out that William Taylor was a labouring man, and resided with his wife in the kitchen of Mr. Stewart's business premises; he had no regular employment, but was occasionally employed to watch streets under repair at night, and to warn carriages passing by of the danger. A transfer to William Taylor and his wife was executed and sent to the society; but Mr. Stewart was informed that the directors were "advised that shares ought not to be transferred into the name of a married woman," and that "the inquiries into the station in life of the proposed transferee were not satisfactory." Some time after, this attempt to transfer was abandoned, and on the 23rd April 1870 Mr. Stewart sent to the society a transfer notice in which it was proposed to transfer one thousand of the shares to "William Walker, Randolph Hill, Denny, Stirlingshire, *gardener*," and the remaining thousand shares to "Thomas Newbigging, Carstairs, Maine, Lanark, *sheep-farmer*," the consideration in each case being 5*l*. This notice was approved, and the transfers were executed on the 27th April 1870, and subsequently registered; the description of the transferees being the same in the transfers as in the notice. It now turned out that William Walker, who was described as a gardener, was a working gardener only, earning 15*s*. a week.; and Thomas Newbigging, who was described as a sheep-farmer, was the son-in-law of William Taylor, and was in the employment of some farmer in Scotland, with the wages of 18s. a week. Instead of paying a consideration for the shares, each transferee received a small gratuity from the transferor for taking the shares.

The society was ordered to be wound-up on the 12th Jan. 1872, and the official liquidators now applied to have the executors of Sir James Simpson (who had meanwhile died) placed on the list of contributories.

Napier Higgins, Q.C. and *Montague Cookson*, for the official liquidators.—The approval of the transfer-notice by the directors was founded on the statements in the notice. These contained a flagrant misdescription of the occupation of the proposed transferees. The transfers must accordingly be set aside, and the executors of the transferor placed on the list of contributories.

Cotton, Q.C. and *Kekewich*, for the executors.—The only reason that can be adduced for avoiding the transfer is that there was a misdescription in the transfer-notice, but there was no misdescription; Walker was actually a gardener, though only a working gardener. [Lord WESTBURY.—They had a right to assume, seeing the character from the representation made, that he was a responsible man. The Scotch gardeners and many other gardeners, such as are to be found round London, are men of large property.] There are special cases in which gardeners are rich men, but the description of a man as a gardener is not a representation that he is a man of means. Nor is the description of a man as a sheep-farmer; many of the Scotch sheep-farmers are persons working in the same way and just as hardly as their servants. If there had been any doubt as to the sufficiency of the proposed transferees, it was the duty of the directors to have made inquiries. They did not, and each transfer is a concluded transaction.

Lord WESTBURY.—

The case is too plain for any argument. When a shareholder hears or finds that they have come to a decision, and knows in his own mind, as he ought to do, that the facts, material for that decision and to enable them to arrive at it, were not before them, and when in his own conscience he knows that he has made to them representations to lull them to sleep, and to prevent their ascertaining the real facts, which possibly without those representations they might have inquired after and ascertained, then it is plain that he cannot with any propriety appeal to the judgment of the directors; for they were either deluded men by his misrepresentation, or uninformed men by his concealment. Now I desire to mark this case particularly with what will be a cardinal principle of my determination. There are cases in which the law permits a man to shuffle off liability on to the shoulders of another, even though that other be a complete pauper. Suppose there be an assignee of a lease, and he assigns it to a pauper, his liability ceases with that assignment. That has been in some cases so admitted, and the reason is plain, because there is no existing obligation, no duty arising from the relation between him and the lessor, but in a company there is a duty that is owing from every shareholder to the rest, and he knows very well that this rule of requiring information is put in to protect his brother shareholders, and if he attempts to get a transfer passed either by misrepresentation or by concealment, by the mere fact of silence and not giving the information to the directors, which he knows to be most material for them, he fails in his duty, he violates the obligation of his relation, and even on that ground alone, without misrepresentation, I would set aside the deed. But here is a gross misrepresentation. A proposal

was made that Sir James Simpson should transfer one thousand shares to his own domestic servant, and that he should transfer the other one thousand to her spouse, dignifying him with the name of Taylor, Esquire, he being a poor wretched man, glad to earn a shilling or two shillings a night by going out and standing in the streets to warn carriages and passengers from dangerous places. That failed altogether. I agree that these directors, if they had been prudent and careful men, might have said: "Well, Mr. Stewart is a man who attempted to practise a fraud on us once before; we will take care and make inquiry now"; but it does not lie in Mr. Cotton's client's mouth to say that. Mr. Cotton's client, who had dressed up the poor wretched labourer with the character of an esquire, dressed up the next man who was a labourer in somebody's garden, with the character of a gardener; but, not content with this, he sends over to a relative of Taylor's, who was a shepherd in the employment of a farmer, and gives him a few shillings to be allowed to use his name, and dignifies him with the character of a sheep-farmer, which anybody, who knows anything about Scotland, knows to be a person concerned with the buying and selling of large droves of sheep, and not a shepherd in the employment of a farmer at the rate of 18s. a week. A shepherd watching the flocks of his master is not a sheep-farmer; but evidently Mr. Stewart ingeniously put them on garments that they might pass muster, and they did pass muster, but I will require Mr. Stewart to discharge the obligation of giving to the directors all the material information which he himself possessed, and which it was the duty of his client as a shareholder in this company to give, and if that be not given, much more if it be disguised and concealed by misrepresentation, the transaction shall not stand. Set aside the transfers and restore the executors' names to the register.

The executors were not ordered to pay costs.

Solicitors for the executors, *Freshfields.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Monday, Feb. 3.

Patersons' Case.

Company—Winding-up—Contributory—Bonâ fide transfer—Misdescription of transferee—Superintendent of a colliery—Acquiescence of directors in a shareholder—Transfer set aside on account of misrepresentation as to occupation of transferee.

The deed of settlement of a company provided that a shareholder might transfer his shares after approval of the proposed transferee by the directors, and the notice of the wish to transfer was to contain "the full name and profession or calling," &c. of the proposed transferee. A shareholder described his proposed transferee in his notice as of "L. Colliery, superintendent." The transferee was approved of, and the transfer registered in May 1870. *It turned out that the transferee was a labourer at the colliery, earning* 19*s. a week.*

Held, in the winding-up in 1872, *that the misrepresentation as to his occupation was sufficient to upset the transfer, and that the original shareholder must be put on the list of contributories.*

On its being contended that the directors had acquiesced in having him as a shareholder, inasmuch as in June 1870 *they had had notice of the true position of the transferee, and down to the presentation of the petition to wind-up in June* 1871 *had raised no objection to his being a shareholder, it was*

Held, that the time was too short to warrant any presumption of acquiescence.

This was a case similar to the preceding one (*sup.* p. 77).

The notice of the wish to transfer described the proposed transferee as "Henry Taylor, of Law Colliery, Carluke, superintendent." He was approved of by the directors, and on the 20th May 1870 the transfers were executed, and subsequently they were registered. It turned out that Henry Taylor was the son of the William Taylor of the preceding case, and was a labourer at the colliery, earning from 18*s.* to 19*s.* a week. Mr. Stewart, the broker of the transferors, had written to him, and offered him 20*s.* if he would allow the shares to be transferred into his name for a time. Taylor executed the transfers without understanding what they were, and under the impression that his connection with the shares would terminate in a few days.

On the winding-up of the society in Jan. 1872 the official liquidator applied to have the names of the original shareholders, the Patersons, placed on the list of contributories.

Napier Higgins, Q.C. and *Montague Cookson* for the official liquidators of the European Society.

Locock Webb, for the Patersons.—There was no misdescription of the transferee's occupation, inasmuch as he was in some sense a superintendent, having some men working under him. [Lord Westbury.—Supposing there is a colliery consisting of several distinct pits, and pit A. is worked by fifty men, and B. is the superintendent of that colliery, and there is another superintendent at another pit of the like nature—they may all be called superintendents, although they are not superintendents of the whole of the colliery; but here it is a poor labouring man at 16*s.* a week, with nothing to superintend but the labour of his own hands and the quantity of work that he does.] Even if there were a slight misdescription, the transfer would still be valid.

Re European Bank, Masters's case, L. Rep. 7 Ch. 292.

Moreover the directors acquiesced in his being a shareholder, after they knew of his true position, for, in an affidavit filed by his brother on the 28th June 1870 in the matter of a petition to wind-up the society, the transferee was referred to as "a labourer at Law Colliery, Carluke." From this time down to the 10th June 1871, the date of the presentation of the petition to wind-up, they raised no objection to his being a shareholder.

Lord Westbury.—

No case will ever with me prevail over the obligation to require parties to state the truth. Here there was an obligation on these parties to state the truth; they knew that perfectly well; but for the purpose of evading the duty they were under, they employ a stockbroker to find out the means of evading that duty. Mr. Stewart accordingly writes to a labouring man, who is the son of another labouring man, who is earning 16*s.* a week in a colliery, and tells him that he would give him something if he would permit his name to be used. Then he uses the name of the labouring man, who is very rightly de

scribed in that affidavit as a labourer in a certain colliery, but instead of giving in his right designation and description, he clothes him, as I have already said, with the character of a superintendent. Now that was utterly inapplicable; that name was attached to him for the purpose of deluding the persons who would receive it. It is said that the directors acquiesced in the notice. They did so, believing it to be true. It is then said the directors of this company have acquiesced in this man remaining on the register. Now it must be acquiescence for a considerable time—that is, time enough to warrant the presumption. Here it is said that they had the means of knowing the fraud practised upon them in June 1870. In that month the society was in a great state of embarrassment, and it ended in being wound-up by an order on a petition presented within a twelvemonth after. You talk of acquiescence precluding the shareholders of the company from asserting their rights; the directors could not by any acquiescence of theirs preclude the shareholders from having the misrepresentation followed out to its consequence of removing this man. If there were a considerable period of time, it might be otherwise, but here there was a very short period of time, and it would not have been possible for anybody to have taken advantage of any means to rectify the register within the short period of time that elapsed. Let the name of this superintendent be removed and the names of the original shareholders be restored, and let the original shareholders pay the costs of this application.

Solicitors for the Patersons, *Lawrance, Plews,* and *Co.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Monday, Feb. 3.

Davies's Case.

Company—Winding-up — Contributory—Composition with creditors—Bankrupt shareholder—Bankruptcy Act 1869, *s.* 31—*Possibility of proof—Liability of bankrupt shareholder to contribute to costs of winding-up a company after receipt by the company of a composition.*

A petition to wind-up the E. Company was presented on the 10*th June* 1871, *and an order to wind-up was made on the* 12*th Jan.* 1872. *In the interval, on the* 26*th Oct.* 1871 *a holder of* 100 *shares presented a petition in a County Court for liquidation of his affairs either by arrangement or by composition with his creditors. The general meeting of creditors was held in Nov.* 1871, *and it was resolved that a composition of* 2*s. in the pound should be accepted. The E. Company were represented at the proceedings by their solicitor, and they proved for* 79*l.* 10*s.* 2*d. in respect of calls then due on the* 100 *shares, and for* 100*l. in respect of the liability of* 1*l. per share not yet called up. On the* 12*th Dec.* 1871 *the company received the composition of* 2*s. in the pound on the two sums of* 79*l.* 10*s.* 2*d. and* 100*l; and the provisional official liquidators gave a written discharge in respect of these two sums.*

In the winding-up of the company, the official liquidators claimed that the debtor was still liable to be retained on the list of contributories in respect of the costs of winding-up the company. The debtor's name being on the list, it was

Held that it must remain there in respect of the costs of winding-up.

Semble, that if the name were not already on the list, it would not be placed there.

In 1871 Charles Davies held 100 shares in the European Society of 2*l.* 10*s.* each, on which 1*l.* 10*s.* per share had been called up. On the 10th June 1871 a petition was presented for winding-up the society, and on this petition an order to wind-up was made on the 12th Jan. 1872. Pending the proceedings on the petition, on the 26th Oct. 1871 Davies presented a petition in the Ashton-under-Lyne County Court for liquidation of his affairs either by arrangement or by composition under the Bankruptcy Act 1869.

On the 31st Oct. 1871 the secretary of the European Society made an affidavit (which was subsequently exhibited to the registrar) in the matter of this liquidation, and thereby stated that Davies was then indebted to the society in the sum of 79*l.* 10*s.* 2*d.* for calls already made on the 100 shares and interest thereon, and that he was under a further liability of 100*l.* in respect of a call of 1*l.* per share that would shortly have to be made.

The general meeting of the creditors was held on the 11th Nov. 1871, and was twice adjourned, until, on the 25th Nov., it was resolved that a composition of 2*s.* in the pound should be accepted in satisfaction of Davies's debts, and that such composition should be payable immediately after the passing of a resolution at a second meeting confirming this resolution. All the proceedings in the liquidation were attended by the society's solicitor; and on the 12th Dec. 1871 the composition of 2*s.* in the pound was paid to the society in respect of these sums of 79*l.* 10*s.* 2*d.* and 100*l.*; and the following receipt was given by Messrs. Bunyon and Low, who had been appointed provisional official liquidators of the society pending the proceedings on the petition to wind-up:—

Received from Mr. Charles Davies the sum of seventeen pounds, nineteen shillings, being the amount of composition of two shillings in the pound upon and in respect of the liability of the said Charles Davies to the European Life Assurance Society of seventy-nine pounds, ten shillings, and two pence for unpaid calls and interest thereon, and also in respect of the claim of the said society for one hundred pounds further for calls not yet made, but to which the said Charles Davies may hereafter become liable upon the shares held by him therein, as respectively mentioned in the proof of the said society filed in the County Court of Lancashire, holden at Ashton-under-Lyne, in the matter of proceedings for liquidation or composition by the said Charles Davies under the liquidation clauses of the Bankruptcy Act 1869, such composition of seventeen pounds, nineteen shillings being accepted by the society in full discharge of all liability of the said society against the said Charles Davies in respect of the said two sums of 79*l.* 10*s.* 2*d.* and 100*l.* respectively.

Dated this 12th Dec. 1871.

C. J. Bunyon,
S. P. Low,
Provisional official liquidators of the European Life Assurance Society.

The further call of 1*l.* per share was made on the 31st July 1872, but the assets of the society would be, it was alleged, insufficient to satisfy its liabilities, and it would be necessary to make a separate call (beyond the liability of 2*l.* 10*s.* per share) to answer the costs of the realization of the assets, and the other costs incidental to the winding-up. It was now contended on behalf of the official liquidators that the discharge given did not include the liability to this further call in respect of the

costs of winding-up; and that Davies's name ought to be placed on the list of contributories in respect of those costs.

Montague Cookson, for the official liquidators.—This differs from *Michael Brown's case* (*sup.* p. 21) inasmuch as here there was no trustee, and the shares were not disclaimed; a discharge was given, and that discharge was expressly limited to the calls already made and the call of 1*l.*, then about to be made. [Lord WESTBURY.—In order to the getting of relief in *Michael Brown's* case, you must have set aside the bankruptcy, and you must have revested the shares in the debtor, the bankrupt, whereas the shares were, through the acts of the trustees and the operation of the statute, annihilated. Then the company, which ought to have known all this, went in, in that state of things, and took the benefit of the bankruptcy, and I thought it was utterly impossible in that case to give any relief; but here this man, who is a shareholder, enters into this arrangment for liquidation, and then a proof is carried in on behalf of the company. That proof is limited to two things —the amount that was then due for calls made, and a sum of money which represented an assessment of future liabilities to calls, but the ulterior liability, namely, to costs of winding-up, was not included in the proof, and was not any part of an arrangement for the exoneration of the shareholder. Is not that so?]

Cracknall, for Davies.—In *Michael Brown's* case the assets were but 4*l.* and the liabilities were 2393*l.*; this is a *bonâ fide* case, a composition of 2*s.* in the pound having been paid. The effect of the composition is analogous to that in bankruptcy; though there is no provision for forfeiting the shares in a composition as in a bankruptcy, yet the effect is that the debtor is discharged in the same way as if he were discharged in bankruptcy. Otherwise there would be a constantly continuing liability. Davies is a fully paid-up shareholder, and his liability has terminated; the principal liability having gone, that which was only incidental to it has gone with it.

Re Land Credit Company of Ireland, McEwen's case, L. Rep. 6 Ch. 582;
Re British and Foreign Cork Company, Leifchild's case, L. Rep. 1 Eq. 231; 13 L. T. Rep. N. S. 267;
Re Marlborough Club Company, L. Rep. 5 Eq. 365; 18 L. T. Rep. N. S. 46.

[Lord WESTBURY.—You see if the liability as a shareholder is taken away by this proceeding in bankruptcy pending the proceedings to wind-up, the liability by reason of these pending proceedings is not shuffled off, is not removed by the proceeding in bankruptcy. There must be power to put the shareholder on in respect of the liability to costs, because the proceedings have already commenced.] This liability should have been included in the proof of the society. [Lord WESTBURY.—Then what sum is to be set aside? You cannot prove for an imaginary thing, unless that imaginary thing is capable of valuation.] The words of the Bankruptcy Act are very wide, including valuations capable of being ascertained only as matters of opinion (sect 31, *sup.* p. 22). It is the object of the Legislature to give the bankrupt a clear discharge from every species of liability. [Lord WESTBURY.—Then he should have brought in this liability, and stated it without attempting to define it, and claimed to have his discharge free of that possible liability, instead of which here is a receipt limited to the 79*l.* 10*s.* 2*d.* and 100*l.*, and beyond that the operation of the discharge does not extend. That case you cited (*McEwen's* case) has nothing to do with the point. There the thing capable of proof was the liability as a contributory; there is no doubt that that was capable of proof. This is utterly incapable of proof. In reason the thing cannot be asserted for a moment. If you will show me a case in which this contingent liability has been held to be capable of proof, and has been admitted to proof, that will be a perfect matter, but to go through all the cases that have nothing to do with the matter is not perfect.]

Lord WESTBURY.—

Michael Brown's case (*sup.* p. 21) is quite distinct from this. I quite agree with Mr. Cracknall that it would be a work of great difficulty, after the shareholder has fully paid up his shares, to put him upon the register for the first time. I shall not deal with that case, because it is not the one before me. The one before me is simply of this nature. This gentleman, Mr. Davies, was the registered holder of 100 shares at the time of his bankruptcy. His bankruptcy then takes place; the official liquidator proves for the amount of calls then due, and he also proves for a sum of money as the estimated amount of future calls; and the proof stops there. The consequence is that this gentleman must be regarded as having been discharged from all liability to calls upon his shares, but he is still open to be retained on the register in respect of another liability, and that is the liability to costs, which is a liability *ultra* the liability for calls in respect of debts. Then Mr. Cracknall has very properly tried to show that that liability to costs at a future time ought to have been brought by way of proof under the proceedings in bankruptcy. That is a thing utterly incapable of being estimated or conjectured, utterly incapable of being represented, unless one had the gift of prophecy to foretell what will take place at some indefinite period, so remote that I will not venture to think of it, namely, the time when the costs of this winding-up will have to be ascertained. Now the Legislature may have used in this Act of Parliament (the Bankruptcy Act) innumerable phrases to designate uncertain things; but the Legislature cannot make any one of those uncertain things into a thing capable of proof, unless it is possible, in some manner or other, to define the liability; because if you were to put a proof in bankruptcy with no sum whatever, and no possibility of ascertaining what is the sum that an unknown thing represents, what are you to do with the assets? Can you withhold your hand from distributing the entire assets, because there is an unknown quantity which it is utterly impossible to believe or suppose will ever become known. It is impossible to have this made the subject of proof except by agreement under this bankruptcy; you could not have defined it, you could not have stated it in the proceedings, you could not have founded upon the proceedings any limit as to your duty in administering the assets. I think it would be utterly impossible to bring this contingent liability within proof; but that is a thing which, in point of fact, it is not necessary to decide. What it is necessary to decide is this, that neither party attempted to bring this indefinite possible liability of the bankrupt into proof. If the bankrupt says, as he does now by Mr. Cracknall, that it admits of being proved, why did he not have it brought forward?

It is utterly impossible for the official liquidator to pledge himself to any statement upon such a shadowy matter as this. Both parties really agreed, or must be taken to have agreed, that it could not be noticed in the proceedings at all. The bankrupt takes his discharge limited to what is expressed in the receipt. Now I quite agree with Mr. Cracknall it would be quite another thing if I were asked to put this gentleman's name on the list of contributories in the face of all that, because he would say: "Why, the observations that you have already made are applicable; how can he be put on the list of contributories in respect of this unknown and apparently incapable of being ascertained quantity?" But it is quite clear that, being on the list of contributories, the measure of his obligation and liability is not fulfilled and discharged, until this possible, though at present unascertainable, liability be ascertained, or be found incapable of having any existence. I must, therefore, leave him on the list, adding only that he is a contributory in respect of the liability to the costs of the realization of the property of the company. I will not make Mr. Davies pay any costs, and I will not give him any.

Solicitors for Mr. Davies, *Clark, Woodcock,* and *Ryland.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Tuesday, Feb. 4.

Gloag's Case

Life Assurance Company—Winding-up—Loan on Policy—Set-off.

Where a policyholder has borrowed money from the company in which his life is insured, and has deposited his policy with the company as security for the loan, and has signed a memorandum charging his policy with the repayment, on the company being wound-up, the liquidator is entitled to sue at once for the sum advanced, and the policyholder is not entitled to set-off against that sum the amount at which the policy may be estimated in the proof.

This was a question of set-off.

Mr. Gloag was the holder of seven policies, granted by the European Assurance Society on his own life at different times between 1859 and 1865. On the 1st June 1865, the society advanced £50 16s. 1d. to Mr. Gloag upon the security of his note of hand and the following memorandum of charge upon three of the policies:—

To the European Society.

In consideration of the sum of £50 16s. 1d. now lent by you to me, I do hereby subject and charge my interest in the policies of assurance, on my life in your society, numbered 22,704, 25,178, and 25,198, and all moneys which may be payable thereunder, to and with the payment of the said sum of £50 16s. 1d., with interest thereon, after the rate of £6 per cent. per annum, from this date till payment.

Dated 1st June 1865. J. W. Gloag.

On the 27th May 1868, the society advanced to Mr. Gloag the further sum of £88, upon the security of his note of hand, and a memorandum of charge upon five of the policies, in similar terms to the memorandum of the 1st June 1865.

The policies comprised in these memoranda were deposited at the society's offices, when the advances were made.

On the winding-up of the society in 1872, Mr. Gloag claimed to be entitled to set off the value of his policies against his debts due to the society in respect of these loans.

Mr. Gloag also claimed to rank as a creditor for the surrender value of one of the policies, which was indorsed with the following special memorandum:

It is hereby declared that should the within-named J. W. Gloag surrender this policy to the within named society during the continuance of this assurance, and after five annual payments shall have been made hereon, the amount which shall be returnable for the said surrender shall be equal to one-third of the amount paid in premiums.

Dated this 21st day Dec. 1859.

W. Cleland, manager.

H. M. Jackson, Q.C., for Mr. Gloag.—This question was decided by Lord Cairns in *Parlby's case* in the Albert Arbitration (15 S. J. 654; Reilly's Albert Rep. 48), but we contend that that decision was based on an erroneous view. To obtain a set-off at common law, you must have the amount of the claim on both sides ascertained, and ascertained at the time of pleading. And here they are ascertained. Under the 158th section of the Companies' Act 1862, the liability on a policy is, immediately on the insolvency of the company, converted into a right of proof, and under the 25th Rule the value of this proof is to be estimated at the date of the winding-up order (*vide* sect. 158 and Rule 25, *sup.* p. 54). How, then, does this right of proof differ from an ascertained debt? Surely it represents for all purposes the obligation for which it is substituted by the statute. Nobody ought to be prejudiced by the delay of the officers of the court in working out the arithmetical calculations which will result in fixing the amount of proof. All the data for ascertaining the amount are known, and it is to be valued as at the date of the winding-up order. At that date, therefore, it must be taken as ascertained. *Id certum est, quod certum reddi potest.* [Lord Westbury.—By the Act of Parliament, upon an order to wind-up the company, all the debts, moneys, and effects of that company are placed in the power of the official liquidator, and his duty is to recover them, and to apply them for the purposes of the liquidation. The liquidation at the same time annihilates the policy, and converts the policy into a thing very different from the original contract; for the policy thenceforth is made to represent a right of proving the value of the policy, and of having the dividend, which will be applicable to the proof of that value, paid out of the assets of the company. But in those assets has already been included, by force of the parliamentary transfer, the money due from the debtor, the borrower of the company. Therefore it is that your money going into the general fund must be applicable to the payment of the dividend, and there is no room whatever for the application of set-off, unless you can carry your argument to what I have already suggested, namely, that the right to recover the 400*l.* from you must be suspended, until the amount of the dividend payable by the company is known.] Assets may not mean in all cases the gross sums of money receivable by the company. In this case the debt may be an asset, only to the extent of so much as may remain, after the obligation of the company of paying the dividend has been proved. [Lord Westbury.—Assets would include all moneys recoverable by the official liquidator in respect of debts due to the company. Your debt was

an independent debt, wholly unconnected with the policy; the money due upon which debt, then, must be swept away by the official liquidator, and carried to that general purse out of which the dividend on your proof will have to be paid.] It is more in accordance with natural justice that there should be a set-off than that the policyholder should pay his debt in full, and receive back only a dividend. It would, moreover, be in accordance with the principles of all the Bankruptcy Acts, and the European Society Arbitration Act gives the arbitrator power of doing anything he may deem to be just.

Montague Cookson appeared for the official liquidator of the European Society, but was not called upon.

Lord Westbury.—

I wish very much that I could accede to the very able and ingenious argument that I have heard, because I feel, as has been justly expressed by Mr. Jackson, that the conclusion at which I am compelled by the enactments to arrive will not be quite in accordance with the dictates of natural justice. I could wish very much that these matters in liquidation had been more closely assimilated to the rule of practice in bankruptcy. I have undoubtedly a right to deal with these matters *secundum arbitrium boni viri*. I have a right to substitute what I deem to be justice for decisions or rules that might be deemed applicable to the circumstances in an ordinary court of justice; a right, which, although it be given me by the statute, would necessarily require not to be followed, except in cases where the claims of justice wholly and entirely overbore what would be dictated by the decisions. But I have no right to add to or to detract from an Act of Parliament; I am compelled to abide by the enactments, which have prescribed and produced the state of things which I have here to deal with under this liquidation. Now, it must be remembered that there are here two independent contracts; there is the contract contained in the promissory notes; there is the contract contained in the policy; they are wholly independent of one another; and it is quite clear beyond possibility of doubt and denial, that if the company were still a solvent or a going concern, and chose to sue Mr. Gloag on these notes, they would be entitled to do so, and must have payment of the money thereby expressed to be secured. Now, in that state of things, the one contract not being at all dependent on the other, the company is ordered to be wound-up; it becomes insolvent, and then there is substituted for the policy another and a different statutory right given to the policyholder. The company, after it has been ordered to be wound-up, can no longer receive any premiums. Therefore there would be a breach of the contract contained in this policy, which is that for a certain premium or annual sum being paid by the assured the policy shall remain a subsisting contract for another year. The company is deprived of the power of carrying on its business, because it is insolvent; and then the Legislature dooms it to this state, that all its property shall be collected and received, and held as a fund for equal distribution among the persons entitled to claim against the company. Well now the policyholder, whose policy was still in force, was a person having a contingent right at a future time, when the policy would be matured into liability by the death of the party, to receive a sum of money from the company. Contingent rights, when there is a liquidation or a bankruptcy, cannot be provided for in any other manner than by ascertaining their value, and treating the value as a present debt admissible of proof. The Legislature accordingly proceeds upon that, and it directs that the existing policy, which is the contingent contract, shall be valued, and that the value may be proved by the policyholder as a debt against the company. Now what is involved in the notion of proving as a debt against the company is this—that it is to rank *pari passu* with all the other persons who have proved their debts, and to receive a dividend thereon out of the property of the company. But immediately upon the liquidation all the property of the company, presently payable and payable *in futuro*, is gathered together, and by the 95th section of the Companies' Act the official liquidator is to have the right of collecting the whole of that property. The result, therefore, of this enactment, is that the money due on the promissory note becomes, instantly, upon the order for liquidation, by force of that order, part of the common stock of the company applicable to the payment of its debts. Now Mr. Jackson urged that the future right on the policy and the power of having that valued and having the value admitted to proof, ought to be considered as having been gone through, and then a set-off will arise between the money payable on the promissory note to the company and the money payable by the company on the proof tendered. It is an ingenious suggestion; but there is nothing to warrant it in the Act of Parliament. There would be something to warrant it, if you could hold that, immediately upon the company becoming insolvent, the debtor of the company on the promissory note would have a right to restrain the official liquidator from receiving a payment of that note, until the amount payable to that same debtor out of the assets of the company should be ascertained. But that would at once strike at the very root of the whole enactment; because in all these enactments, touching the application of the money of a bankrupt or the money of an insolvent company, all the directions are founded wholly upon this—that the property of the company shall be distributed *pari passu*, and therefore if the property, consisting of the money due on this promissory note, were diminished by the money ultimately to be received by the debtor on those notes from the assets of the company, it would have the effect, *pro tanto*, of subtracting from the creditors' fund under the insolvency that portion of the fund which is represented by the money due on the promissory notes, and to that extent it would have the effect of giving priority and preference to the debtor on those notes. That would strike at the very root of distribution under the circumstances. The whole claim is totally prevented and anticipated by the statutory enactment, unless you can carry your argument, as Mr. Jackson attempted to do, to the extent of holding that the money due on the note must be considered as suspended property of the company, not to be recovered until the counter liability of the company to the debtor on those notes has been ascertained. There is no power to do any such thing; there is no power to give a limited interpretation to the words of the 95th section of the Companies Act. The official liquidator has power to sue for and recover the money due on the note, and then he is bound to apply it for the equal benefit of all persons

proving under the liquidation, and if I were to say that he ought not so to do, but to hold it until the claim of the particular debtor, who has paid that sum of money, has been ascertained, and then that he was to strike a balance, I should utterly supersede the whole of the enactment, I should violate the principle of equal distribution, and I should give this particular person, who is a debtor on a present immediate contract, the right of receiving, in preference to the other creditors of the company, the amount due from himself to that company. I regret very much that it is not in some way provided for. It is, unfortunately, the result of the bankruptcy and of the insolvency; it is, unfortunately, the result of that which follows immediately upon insolvency, namely, that all the property of the insolvent must be distributed fairly and equally among the persons who are entitled to prove against the insolvent, and the consequence of that is that the original contract is wholly superseded, and something different is substituted for it, and the right of the person, who contracted with the company, is reduced from what is expressed in that contract to the simple right of proving the value of the contract as it stood at the time of the insolvency. I give these reasons because, although I have no doubt that there are better reasons in the decision of Lord Cairns, which has been referred to, yet I am desirous in all these matters that come before me, of showing that, though I shall respect and endeavour to abide by and follow the reasons given in perfectly similar cases, when they are cited before me, yet I hold myself bound in the first place to decide the case according to what I believe to be the law and equity and justice of the case, and therefore I give my decision, founded upon what I have said, which I trust is in harmony with the reasons of Lord Cairns, and I am obliged therefore to reject this application for the set-off. With regard to the other point, I cannot meddle with the policy in order to enforce any particular right under the terms of the policy, not claimed by the policyholder before the insolvency. The thing must stand as it stood at the time when the insolvency was pronounced by the winding-up order. The policyholder must take his policy as it then stood, and he cannot claim to do something now which he might have done then. The tree is cut down at that time, and the value of the policy, precisely as it stands, must be ascertained at that time; and I cannot interfere with that valuation by doing anything on the policy, which no longer remains subsisting as a policy contract, except for the purpose of being valued and proved under the insolvency. Mr. Jackson, as this is a representative case, I will allow you to have your costs out of the estate.

Solicitor for Mr. Gloag, *Rowland Miller*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

Tuesday, Feb. 4.

Williams's Case.

Company—Winding-up—Contributory—Bonâ fide transfer—Misdescription of transferee—Merchant—Misdescription of consideration—Promissory note—Unsuccessful attempt to set aside a transfer on account of misrepresentation as to occupation of transferee and as to consideration.

The deed of settlement of a company provided that a shareholder might transfer his shares after approval of the proposed transferee by the directors, and the notice of the wish to transfer was to contain "the full name and profession or calling and place of abode" of the proposed transferee. In 1869 *W., who held* 1000 *shares, sent through his banker's brokers a notice of his wish to transfer his shares to J., and in the notice J. was described as a "merchant," and the consideration as* 450*l. The proposed transferee was approved of by the directors, and the transfer, which set out the same consideration and the same description of the transferee, was registered.*

In the winding-up in 1872, *the official liquidators contended that the misdescription of the consideration and of the occupation of the transferee was sufficient to annul the transfer; for it turned out that the transferee had been working in a corn-mill, in the employment of the transferor, for small wages, and had subsequently occupied a small mill, which he worked himself without any servants; although, besides grinding corn, he occasionally sold it; that the consideration was not* 450*l. cash, but a promissory note for* 450*l., upon which no interest had ever been paid; but the transferee now alleged that he had hoped to be able to pay the whole sum in six or seven years, although at the time he was not worth more than* 60*l.*

The word "merchant" had been inserted in the transfer-notice, and in the transfer by the transferor's banker, without the knowledge of the transferor.

Held that the transfer could not be annulled; under all the circumstances, it could not be said that the description of the transferee was so untruthful that it must have been put in with a view of blinding the directors, or that it ought to have satisfied the directors without inquiry; the term "merchant" being so indefinite that prudent persons ought not to have been deterred from further inquiry. Moreover, it could not be said that the word was introduced with the privity of the transferor. And further, it could not be said that the promissory note was a sham, or that the misrepresentation as to the consideration was sufficient to induce the directors to pass a transfer, which they would not otherwise have passed.

On its being contended that it was an understood thing that the transferee was to be indemnified by the transferor, and that the contract was not a bonâ fide one, with the intention of transferring the shares absolutely, it was

Held that there was no ground for arriving at such a conclusion.

This was a question as to the validity of a transfer of shares.

It was provided in the 96th clause of the deed of settlement of the European Assurance Society that a shareholder, who wished to transfer his shares, should send to the society a notice of his wish, and should describe in the notice "the full name and profession or calling and place of abode of the proposed shareholder," and on the approval of the proposed shareholder by the directors, he might transfer his shares: (Clause 96; *vide sup.* p. 11.)

In 1869 Mr. Richard Williams, of Dolgelley, corn merchant, was the holder of 1000 shares in the society, of 2*l.* 10*s.* each, on which 15*s.* per share had been paid up, and on the 4th Sept. of that year he sent to the society, through Messrs. Barber

and Co., brokers, a notice of his wish to transfer the shares to "Lewis Jones, of Llywn Mill, Dolgelley, merchant," the consideration being stated as 450*l.* This notice was approved of by the directors, and the transfer was executed and registered, the consideration and the description of Lewis Jones being the same as in the notice; and the certificates were sent to Messrs. Barber and Co. for Lewis Jones. In 1869 petitions were presented for winding-up the society, and ultimately, in June 1871, a petition was presented, on which a winding-up order was made in Jan. 1872.

In the winding-up the official liquidators applied to have Mr. Richard Williams placed on the list of contributories in respect of the shares, on the ground that the transfer was not a *bonâ fide* one; and, further, that the directors had been induced to approve of the transfer by the misrepresentation as to the occupation of Lewis Jones, and as to the consideration. It appeared that the consideration was not 450*l.* cash, but was a promissory note for 450*l.*, signed by Lewis Jones, payable on demand, and bearing interest at 5 per cent. per annum. With regard to Lewis Jones's occupation, up to May 1869 he was a working miller only, in the employment of Mr. Richard Williams, for the remuneration of 10*s.* a week and his food. In May 1869 he succeeded Mr. Williams as tenant of a mill, the rent of which was 20*l.* a year. He did not employ any men, but did all the work of the mill himself. His wife occupied a house at Dolgelley, which she let for lodgings. At the time of the transfer he was worth in all about 50*l.* or 60*l.*, but he now alleged that he had hoped to be able in six or seven years to pay the money on the promissory note.

It appeared that Williams had gone to Jones and had induced him to take the shares. The transfer was prepared either by Mr. Edwards, of Dolgelley Bank, or by the brokers of the bank, Messrs. Barber and Co. Two or three days after the execution of the transfer, Mr. Edwards brought the promissory note to Jones, who signed it and gave it to Williams, the signature being witnessed by a servant in the post-office, and the date the 13th Sept. 1869. He never paid Williams any interest on the note, but about a year after the transfer, Williams had applied to him for interest. Williams and Jones were now examined, and both swore that the transaction was a *bonâ fide* one, with the intention of transferring the shares absolutely to Jones; and that there was no understanding that Jones was to be indemnified by Williams. They both considered the word "merchant" as hardly applicable to Jones. Williams in his evidence further stated that he knew nothing of the insertion of the word "merchant" in the transfer notice, or in the transfer. Mr. Edwards, of the bank, had inserted the word without his knowledge; he (Williams) could only account for its insertion from the fact that persons, who deal in corn or coal, are sometimes designated merchants; he stated also that Jones did buy and sell corn, though not to any considerable extent, the grinding of corn being his principal occupation.

Napier Higgins, Q.C. and *Montague Cookson*, for the official liquidators.—We contend that it was well understood between Williams and Jones that no payment of either principal or interest on the promissory note was to be enforced, and that Jones was to be indemnified by Williams against all liability in respect of the shares; and that the transfer was not, and was not intended to be, a *bonâ fide* transfer, but was a form gone through for the purpose of shifting the liability from Williams to an insolvent person, at a time when the society was known to be in a state of embarrassment. Moreover, the description of the transferee as a "merchant" was clearly a misrepresentation; so also was the misdescription of the consideration as 450*l.* cash, instead of a valueless promissory note. These misrepresentations were sufficient to induce the directors to pass the transfer without inquiry, and accordingly the transfer ought to be avoided.

Cracknall appeared for Williams, but was not called upon.

Lord WESTBURY—

This was a very proper case to be brought before me by the joint official liquidator. It is a case which, if we could probe it to the bottom, no doubt would be found to yield most important materials. But I must deal with it upon the evidence that has been brought before me. If it were clear to me upon that evidence that this was not a *bonâ fide* contract, entered into with an intention of making an actual transfer, out and out, of these shares, I should undoubtedly refuse to recognise Mr. Jones, and should restore the real proprietor to his position upon the register. But notwithstanding the circumstances, I do not think that I have enough before me to enable me to set aside the whole of this transfer, as being a thing that was in form only, and not in reality. Mr. Jones swore, and apparently in an artless and an honest manner, that certainly he did buy the shares, that certainly he intended to buy the shares; that certainly he often complained to Mr. Williams of the bad bargain that he had been induced to enter into. Well now those are expressions on the part of Jones, which I have no doubt are perfectly true—very natural expressions, but I think consistent only with the fact of there having been an actual contract and an actual transfer. Then we come to the case of Mr. Williams, whose conduct appears to me to have been open to great reprehension. He is aware of the unsettled, unstable condition of the affairs of the company. He does not carry his shares into the market, or put them into the hands of a broker to find a proper purchaser for them; but having had a servant in his employment, working a mill, of part of which that servant had a short time before become the lessee, he goes to that man—a man of most limited and imperfect information—and persuades him to buy the shares. Now, I cannot here administer, on behalf of the company, any equity that may exist between Mr. Williams and Mr. Jones. It may have been, and in my opinion it was, a most reprehensible thing to go and persuade a poor man, like Mr. Jones, to put himself in this situation. But because it was so reprehensible, I cannot annul the transaction, which is not complained of by Mr. Jones, but is complained of by a third person. The third person must annul it upon the rights that he has. He cannot annul it upon any equity or ground of complaint that Mr. Jones may have. For it is a very different thing, the setting aside of a contract, because it was unfairly obtained, and treating a contract as a nullity because in reality it was a sham and never a *bonâ fide* transaction. If it were proved to me to be that sham, then undoubtedly I should treat it as a positive nullity. But I find it

a transaction much to be condemned, that might well be complained of by Jones, but upon grounds of which the company cannot avail themselves. Well then, it appears that this poor man, who does not seem to have understood even the ordinary terms which are employed in speaking of shares and the dividends on shares, and calls on shares, was persuaded by this Mr. Williams to give him a promissory note for 450*l*. He, it is true, swears that he gave it knowingly, and that he believed that he might in six or seven years be able to raise and pay the money. That is a very important circumstance with regard to the reality of the transaction as between Mr. Williams and Mr. Jones. If I am obliged, therefore, to regard the materials before me as insufficient to amount to evidence of this contract being a nullity, I proceed to consider whether the contract was dealt with in such a manner that the company has a right to say they were imposed upon, and ought not to be bound by the contract. I should observe that the counsel pressed Mr. Williams, and also Mr. Jones, on the point whether Mr. Jones believed or had any reason to think, that he would be ultimately indemnified by Mr. Williams; but I do not find any trace of any circumstance occurring, or any conversation, that would warrant me in arriving at that conclusion. Then now we come to the merits of the case, as affecting the company. The company, of course, must rest their case upon the ground of their having been so imposed upon, that they passed these transfers, which but for the imposition they would not have done. Now the imposition is represented as consisting of two facts, the effect of two facts taken in connection with one another: the one that Jones, the working miller, is described as a "merchant;" the other that the transfer bore upon the face of it, that it was made in consideration of 450*l*. paid by Jones to Williams. It is very right as Mr. Higgins reminded me, that in judging of the representation, I should take both those circumstances together, the effect on the directors' minds of the man being described as a merchant, the effect on the directors' minds jointly with that of the misstatement that the money had been actually paid. Now although it is true that the money was not paid, yet it is also true that security was given for the money. And I have not been able to find in the evidence anything warranting my pronouncing that the security, that is the promissory note given for the money, was a sham; on the contrary, the parties swear that the promissory note was a *bonâ fide* one; it appears to have been prepared by a respectable person, who I hope would not have lent himself to a transaction which he had reason to believe was a mere sham; and it is also witnessed by another person, apparently a man of respectability also. I cannot say, therefore, that money being described in a transfer as having been paid which in reality was not paid, but only acknowledged to be due by a promissory note of this kind, amounts to that quantity of misrepresentation that would induce the directors to pass the transfer that they would not otherwise have passed, or enable them to say that they had been imposed upon. It must be always remembered that the 96th clause of the deed (*vide sup.*, p. 11), in specifying what the notice of transfer shall contain, does not at all advert to the necessity of stating truly and explicitly the consideration for the transfer; therefore this circumstance of the consideration can be viewed only in connection with the representation of the transferee being a merchant. Well, now, in the cases that I have had to deal with (*Simpson's Case, sup.* p. 77; *Patersons' Case, sup.* p. 79), there was no doubt of the *malus animus* of the parties; there was no doubt a conspiracy. They met together for the very purpose of effecting a fraudulent transaction. In the one case the party went out and bought a person, in reality, to be transferee of the shares, being a person utterly incapable of meeting any demand. In the other case the transfers were made to servants, or to persons procured through the agency of persons in the actual employment of the transferor. The transaction originated, in every case before me, in an engagement and union between the parties to get a person by means of a false description, who himself should be accepted by the directors as a fit person to receive the shares. And I laid down this rule, which I mean to adhere to, that a shareholder shall be bound to make a truthful statement to his brother shareholders in a transaction of this kind. He knows the requisition in the deed is for the benefit of all the shareholders in the company, that men of responsibility, and not men of straw, should be received into the body of the company; and if the shareholders know that the representation is one which is likely to deceive, and is intended to deceive the directors, he shall have no benefit of the transfer that was so acquired. Now I mark those two things. In the cases before me, it was plain that the representation was meant to deceive, as it was most likely to do, and it was also plain that it had in all probability lulled the vigilance of the directors to sleep, and therefore the meditated trick had accomplished its object, and had carried out the original wicked intent of the parties. But do these things exist here? I suspect a great deal, but I cannot act upon suspicion. You have not been able to find anything to justify my saying in a court of justice this word "merchant" emanated from the parties, and was put in *malo animo*, for the purpose of preventing inquiry, stifling the truth, and leading the directors to a false conclusion. Mr. Williams has sworn, and I hope he has sworn in conformity with the truth, that he knew nothing of the insertion of the word; and he has sworn that he had no intention in filling up this notice of transfer, to fill it up in such a manner as to deceive the directors. There has been added to that, upon the examination by Mr. Cracknall, the fact that the company had an agent at Dolgelley, near which this mill is, and that the company had therefore an easy means of detecting any misrepresentation. I mention that, not for the purpose of arriving at a conclusion that, where there is a representation, the directors are bound to inquire; because the representation, if a sufficiently full one, would naturally put them off from inquiry. But now this word "merchant" would hardly have put off, or ought to have put off, the directors from inquiry. It is a very indefinite thing. *Dolus latet in generalibus.* Mr. Williams says that it was the frequent description of himself and of the tenants or proprietors of mills, who were in the habit not only of grinding corn at a sort of price per bushel, but also in the habit of buying and selling corn; and he has told us that this man Jones was in the habit of doing that. Under those circumstances I cannot say that the word merchant was introduced with the privity of Mr.

Williams. I cannot say that there is brought home to him the fact of his having suggested to the gentleman who filled up this notice that he should put in any description that would give to Mr. Jones a character that he really did not possess, and would make him appear of more importance in the eyes of the directors. I cannot say, therefore, that I find either that the thing itself ought to have satisfied the directors without inquiry, or that it was so untruthful that it must have been put in with the view of blinding the directors, and the word is something so general and so indefinite, when connected with a miller, that I think prudent persons ought not to have been deterred from further inquiry, when that further inquiry was so easy. Under all these circumstances I do not find that I am strong enough, though quite willing enough in the present case, to annul the transfer, and therefore I am obliged to dismiss this application. I certainly shall not dismiss it with costs.

Solicitors for Mr. Williams, *Clarke, Woodcock, and Co.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

Tuesday, Feb. 4.

MANISTY'S CASE.

Company—Winding-up—Contributory—Forfeiture of shares—Misuse of power—Shareholder placed on list of contributories, although his shares had been declared by the directors to be cancelled in consequence of the non-payment of calls.

The deed of settlement of a company provided that, in case any call upon any shares should remain unpaid for two months, the directors might declare the shares to be forfeited, and might proceed to sell or otherwise dispose of them, and in the meantime the shares should be extinguished.

M. was a director of the Bombay Branch of the company, and as a qualification for his post, held fifty shares in the company. In 1870 *the London directors passed a resolution rescinding the rule that required the holding of fifty shares as a qualification for the Bombay directorate, and at the same time passed a resolution, whereby it was resolved that the calls due upon the shares then held by the Bombay directors not having been paid, the shares were declared to be cancelled under the clause in that behalf in the deed of settlement. M. had notice of the calls that had been made on his shares, and not having paid them, had no reason to suppose, and did not suppose that the shares were cancelled for any other reason than that expressed in the resolution, viz., the non-payment of the calls.*

In the winding-up of the company in 1872, *the official liquidator applied to have the cancelment declared void, and to have M.'s name placed on the list of contributories.*

Held, that inasmuch as the clause in the deed of settlement referred only to an actual bonâ fide *neglect to pay calls, the resolution to cancel the shares under these circumstances was a misuse of the power contained in the clause, it being a mere pretence that M. was a defaulting shareholder. And although M. had no knowledge of the intention of the directors, still he could not take advantage of the benefit so conferred upon him, and his name must be placed on the list of contributories.*

THIS was a question as to a forfeiture of shares.

Mr. Henry Manisty was a member of the Board of Directors of the Bombay branch of the European Society, and to enable him to qualify for this post, he held fifty shares in the society. In 1870 arrangements were made for cancelling the rule by which the holding of fifty shares was necessary as a qualification for the Bombay directorate. In a letter written on the 16th Aug. 1870 to Mr. Parminter, the manager of the society, by the society's solicitors, the following advice is given:—

With regard to the shares held by the directors in India, we think, although there is no legal obligation, yet there is a moral one, to relieve them of their lisbility, and that the best way to do this would be to take a transfer from them at the price of the day in the name of some third party, have the same registered so as to relieve them from having their names kept upon the list of members, and return the value they paid for their shares in cash, and pass it through your books as compensation or bonus for services rendered.

FRANK RICHARDSON and SADLER.

The society did not act on this advice, but on the 23rd Aug. 1870, a meeting of the directors of the society was held in London, and the following resolutions were passed:

Resolved, that clause 1 of the constitution of the Indian branches, so far as the same relates to the qualification of members, &c., be and the same is hereby rescinded.

Under the advice of Messrs. Richardson and Sadler, solicitors of the society, it was resolved that the calls due upon the shares held by the following gentlemen, now or lately directors of the society's branches in Bombay and Calcutta, not having been paid, the said shares, according to the numbers set opposite each name, are in terms of the 22nd clause of the society's deed of settlement, declared to be, and are hereby cancelled.

Under the advice of Messrs. Richardson and Sadler, solicitors of the society, it was also resolved that a sum not exceeding 158*l.* 15*s.* be allowed to Messrs. Farran, Morris, Angus, Manisty, Hay, and to Messrs. Cowell and Collise, for special services rendered in connection with the Indian branches.

The clause of the European Assurance Society referred to in these resolutions was the following.

Clause 22:

That in case any instalment or call upon any share or shares in the company shall (either in the whole or in part) remain unpaid for the space of two calendar months after the day fixed for payment in the circular letter and advertisement giving notice thereof, the board of directors may, at any time or times after the expiration of such two calendar months, declare that the share or shares, in respect of which default in payment has been so made, or any of them is or are forfeited, and that, whether the instalment or instalments due or owing shall or shall not have been sued for, and whether any action or actions, suit or suits, in respect thereof shall or shall not be actually pending, and the same share or shares, and all sums and every sum paid thereon, and all benefit and advantage whatsoever attending the same shall, upon the declaration of such forfeiture become and be forfeited to the company, and the board of directors may thereupon or at any time afterwards at their discretion proceed to sell such shares, either together or separately, and either by public auction or by private contract, or in any other manner as they may think advisable, and such share or shares when sold shall without any further act be registered in the name of the purchaser or purchasers thereof respectively, and such share or shares shall, until sold or disposed of, or re-issued by the board of directors under the power for that purpose herein contained, sink and be extinguished, and be, and be treated in the like manner as if the same had never been subscribed for or taken. Provided nevertheless that the board of directors may at their discretion discharge any forfeited share or shares, or any of them, whether forfeited under this or any other provision in these presents, from forfeiture, and restore the same to the proprietors or proprietor thereof on such terms as the board may think proper. Provided also that nothing herein contained shall prevent the board from enforcing the payment of any instalment or call, instalments or calls, due on any such share or shares, notwithstanding such forfeiture;

On the 26th August 1870, the secretary in London wrote to the secretary in India—

In acknowledgment of the special services rendered to the society for some time past by Messrs. Manisty, Farran, and Angus present, and by Messrs. Hay and Morris late, local directors of our branch, the directors desire me to request you to divide amongst these gentlemen the sum of 128*l.* 15s. as extra fees.

The calls upon the shares held by Messrs. Hay, Manisty, Angus, Farran, and Morris not having been paid, the shares in question have, in accordance with the 22nd clause of the society's deed of settlement, been cancelled by resolution of the board. The following resolution has been passed by the board: That clause 1 of the constitution of the Indian branches, so far as the same relates to the qualification of members, be and the same is hereby rescinded. The obstacle to the formation of a new local board being thus removed, the present directors of the Bombay branch can now proceed to fill up the vacancies by nomination, such nomination to be of course subject to confirmation by the home board according to the clause of the constitution bearing thereupon.

Mr. Manisty had no knowledge whatever of the advice that had been given to the London Board by their solicitors. He had notice of the calls that had been made on his shares, and not having paid them, he had no reason to suppose and did not suppose, that his shares were forfeited for any reason other than that expressed in Mr. Easum's letter, viz., the non-payment of calls. In the share-ledger of the society there was the following entry in respect of Mr. Manisty's shares:

By board resolution of the 23rd Aug. 1870, the above fifty shares were declared forfeited to the society.

In July, 1871, Mr. Manisty sent in his resignation of his seat at the Bombay Board.

On the 12th Jan. 1872, the society was ordered to be wound-up on a petition presented on the 10th June, 1871. In the winding-up the official liquidators contended that, though the sum allowed to the Bombay directors was not exactly the same as that paid by them for their shares, yet it was nearly so, and that it was the intention of the London directors to make them a return of their capital, and that this was an illegal transaction. They further contended that the resolution to forfeit the shares was not warranted by the 22nd clause of the society's deed of settlement, but was merely a device, resorted to for the purpose of enabling the Bombay directors to get rid of their liability at a time when the society was known to be in a state of doubtful stability. An application was accordingly now made to place Mr. Manisty's name on the list of contributories to the society.

Napier Higgins, Q.C., and *Montague Cookson*, appeared for the official liquidators.

Whitehorne for Mr. Manisty.—The forfeiture of the shares was not prejudicial to the company, but was to their benefit, the whole transaction was carried out with a view to retaining and obtaining the services of gentlemen of position as Indian directors. The London directors had power to cancel the shares, and the resolution to cancel them was a *bonâ fide* act on their part. With regard to Mr. Manisty, he never supposed that the shares were forfeited for any other reason than that assigned—the non-payment of calls. In any case, therefore, he ought to have the benefit of the forfeiture. After the transaction, he could not have gone to the London Board and have said, "What right had you to forfeit my shares? I insist on having them back again." If he could not have the benefit of the shares, why should he have to bear the liability?

LORD WESTBURY.—

The shareholders in this company, by the official liquidators, come and complain to me that the directors of the company improperly released Mr. Manisty from his co-liability with them in respect of his fifty shares. No doubt the directors were animated by what Mr. Whitehorne has dilated upon—a very good motive in doing what they did. They received very bad advice; but they do not seem to have followed it; and it does not appear, so far as Mr. Manisty is concerned, that any kind of imputation or reproach rests upon him. The directors believed that they could accomplish their object by the use of a power of transfer contained in the deed. And then they resorted to that power, not being averse to Mr. Manisty, but wishing to use the power for the purpose of effecting thereby a benefit for their friend Mr. Manisty. Well, but the power in question was never intended to be made the instrument for what I may call such a collusive transaction. It becomes a collusive transaction, although made without the concurrence of Mr. Manisty, when he claims the benefit of it. A power of forfeiture, contained in a deed like this, is intended to be exercised, when there is an actual *bonâ fide* refusal by a shareholder, or an actual *bonâ fide* neglect, to pay the calls that have been made upon him; and then the directors are warranted, if they think it right, to forfeit the shares of the failing or delinquent shareholder. But Mr Manisty was not in that position, and they knew very well that he never would have been, and that he never was intended to be, but they pretend that the calls were due from him, which in reality was contrary to the intent. And they pretend that he has made default in payment of those calls, which they knew was not the truth, and therefore they set him in a position, as a man against whom they had to take adverse proceedings, and who, by reason of his refusal to recognise the act under his liability to the company, had brought himself within the words of the clause of forfeiture. They use, therefore, the words of that clause to the letter, but not in conformity with the truth. Well, now, that has been denominated by courts of equity, which have been very wisely careful upon these matters, as a misuse of the power; sometimes it is denominated a fraud upon the power, because, in point of fact, fraud comes under the old definition *aliud actum, aliud simulatum.* Here the *aliud simulatum* was the pretence of Mr. Manisty being a defaulting shareholder, which in reality he was not; but he was dealt with, as if he had been, whereas the directors knew that they were putting upon him a character which was at variance with the truth. He cannot hold the benefit so acquired, simply for this reason, that the persons, who endeavoured to give it to him through the medium of this power, had no right to do so; they had no right to rob the other shareholders of the benefit of the co-liability of Mr. Manisty, and using the power for that purpose was, in point of fact, a misappropriation and a destruction of so much of the property of the other shareholders. It would have been the same thing, and might, if these arguments were worth anything, have been carried to the extent of releasing the proprietor of 1000 or 2000 or 5000 shares. The vice of the thing lies in this—that the directors have taken upon themselves to release a shareholder, who was co-liable with the other shareholders, and in that

respect unjustly to deprive the other shareholders of the benefit of his contribution. A gift so made, and having that effect, is a gift which Mr. Manisty is not at liberty to accept, although the appropriation of the gift, and the notion of it, and the carrying it into effect, were matters with which he had no concern, and of which, by possibility, he never dreamt. He cannot take this improper gift. He must be restored to the register, as the proprietor of fifty shares. He has very much reason to complain of the mode that has been adopted, and the directors have some reason to complain that they had not fallen into the hands, perhaps, of better advisers. The result, however, has been that they have done what they ought not to have done, and that Mr. Manisty cannot take the benefit of what the directors had no power and no justification for doing. I shall not make Mr. Manisty pay the costs of this matter, and the costs of the liquidator will come out of his own estate.

Solicitor for Mr. Manisty, *H. Ramsden.*

Solicitor for the official liquidators of the European Society, *Mercer and Mercer.*

Wednesday, Feb. 5.

Swift's Case; Kelly's Case.

Life Assurance Company — Amalgamation of companies — Winding-up — Policy — Novation of contract — Payment of premiums — Receipts — Annihilation of company — Amalgamation circular — Policyholder held, after an amalgamation, to be a creditor, not of the new company, but of the old.

S. held a participating policy granted by the R. Life Assurance Company, in 1853, *on his own life. In* 1866 *he received circulars from his company stating that they had made an arrangement with the E. Life Assurance Society for undertaking the obligations of the policies, and that the E. Society would in future be the substitute of the R. Society; and further that, "the terms and conditions of your policies remain of course unaltered by the arrangement, and although each policyholder is fully guaranteed for all claims under the present policies by the covenants of the E. Society in the deeds between the two companies carrying out the arrangement, any of the assured desiring it may, for greater security, either have an indorsement to that effect made on their policies, or may have a policy guaranteeing the existing policy, or a new policy of the E. Society." Annexed to one of these circulars was a circular from the E. Society announcing the transfer of business and offering a new policy, or a guarantee policy, or an indorsement.*

The policyholder took no notice of these circulars. The policy was never indorsed, nor was any guarantee or substituted policy issued to him, nor was any bonus ever received in respect of the policy. Subsequently to 1866 *he paid his premiums to the E. Society, and accepted receipts from them.*

In the winding-up in 1872 *it was contended, by the official liquidator that the circulars contained the offer of a new contract in lieu of the old, and that this offer had been accepted by the payment of the premiums to the transferee company.*

Held, that there was no novation, and that the policyholder was still entitled to claim on his policy against the R. Company. Out of the various proposals contained in the circulars the policyholder had acceded to one only—that the terms of the policy should remain unaltered.

Payment of the premiums to the transferee company, in accordance with a direction to that effect, is equivalent to the payment to a bank in accordance with a direction to that effect.

On its being contended that the provisions of the transferor company's deed of settlement had been followed so as to effect an absolute dissolution and annihilation of the company, the case differing from Barnes's case (*sup. p.* 72) *in that a valuation had been made of the assets of the transferor company, it was*

Held, that the power of dissolution contained in the deed of settlement could effect an annihilation of the company only as between shareholders, and not as against policyholders.

These were questions of novation.

In 1853 the Royal Naval Military and East India Company Life Assurance Society granted to Mr. Swift a participating policy, whereby the funds of the Society were, subject to the provisions of the society's deed of settlement, to be liable on his death to pay to his executors, &c., the sum of 100*l.*

The Royal Naval, &c., Society's deed of settlement contained provisions, whereby the directors might, on the dissolution of the company, obtain from some other company an undertaking to pay all the policies, &c., of the society, and might transfer to such other company so much of the property of the dissolving company as should be agreed on as sufficient, with the future premiums, to enable the company, from which the undertaking might be obtained, to comply therewith: (clauses 172 and 173; *vide sup.* p. 47).

In 1866 the Royal Naval Society was dissolved in accordance with these provisions; and, by the agreement for amalgamation with the European Society, it was arranged that "the presumed realisable value of the property and assets of the Royal Naval Society should be taken at the agreed sum of 98,060*l.* 7*s.* 3*d.*, of which 83,951*l.* 7*s.* 3*d.* should be taken as the agreed and sufficient proportion, together with the premiums to become payable on the existing policies of the Royal Naval Society, to enable the European Society to pay and satisfy" the liabilities, debts and engagements of the Royal Naval Society: (clause 3; *vide sup.* p. 48.)

In Aug. 1866, Mr. Swift received the following circular from the Royal Naval Society:—

To the Policyholders and Shareholders of the Royal Naval Military and East India Company Life Assurance Society.

18th Aug. 1866.

My Lords, Ladies, and Gentlemen,—In face of the active competition now so prevalent in life assurance business, and of the union or amalgamation of offices so constantly taking place, to their mutual advantage by lessening the expenses of management, and increasing their vitality and strength, my colleagues and I have for some time past been most anxiously considering, whether the interests of the assured and the proprietors of our society would not be maintained and promoted by the union of its business with that of some other larger company; and we have arrived at the conclusion that such would undoubtedly be the case.

Started originally in the interest of the Naval and Military services, the society's business has almost necessarily been of a restricted character, and though in later years we have tried to extend it into a more general connection, our success has been but partial.

The society is, however, as it ever has been, in a sound

and healthy state, and its business must be a valuable accession to any office of greater means and capabilities.

Under this belief, therefore, we have entertained overtures from a company of very large business and undoubted security, who are willing to take over the society's business and responsibilities, under an arrangement, which, after adequately securing as the primary consideration, the society's policyholders, will give the shareholders a return of their original paid-up capital in cash, or at their option, in shares of that company, and in the latter case with a considerable bonus. The constitution of all modern companies provides for these advantageous unions or amalgamations, and this proposed arrangement virtually amounts to union or amalgamation with the company referred to.

The society's deed of settlement, though not expressly providing for union or amalgamation, does in effect render it practicable by a dissolution of the society, and, after due deliberation, we have deemed it our duty to call an extraordinary general meeting of the shareholders, to take the subject into consideration, as indicated in the annexed notice, and we trust the movement may receive your cordial approval and co-operation.

I should add, that the proposed arrangement provides for two of my colleagues and myself joining the board of the other company, in order the more effectually to secure the interests of our assured and shareholders, and that the principal portion of the staff at present employed by the society will go over to that company, and the society's business would continue to be conducted at No. 17, Waterloo-place until further notice.

Frederick Smith, Chairman.

In Sept. 1866 a second circular was sent to Mr. Swift from the Royal Naval Society:

To the Policyholders of the Royal Naval, Military, and East India Company Life Assurance Society.

18th Sept. 1866.

My Lords, Ladies, and Gentlemen,—Adverting to the circular I addressed to you on the 18th Aug. last, I have now the satisfaction to inform you that the two extraordinary general courts of the proprietors, required by the society's deed of settlement for the purpose, unanimously decided upon a dissolution of the society, and that its dissolution takes place as from the 14th inst. The first duty of the directors was to make, in accordance with the deed of settlement, an arrangement with another company for undertaking the obligation of your policies, and securing the interests of the assured, and they have accordingly made such an arrangement with the European Assurance Society, who will in future be the substitute of the Royal Naval, Military, and East India Company Life Assurance Society.

General Sir George Pollock, G.C.B., K.S.I., Vice-Admiral Michael Quin, and I join the board of the society, in order the more effectually to secure your interests.

The terms and conditions of your policies remain, of course, unaltered by the arrangement, and although each policyholder is fully guaranteed for all claims under the present policies by the covenants of the European Society in the deeds between the two companies carrying out the arrangement, any of the assured desiring it may, for greater security, either have an endorsement to that effect made on their policies, or may have a policy guaranteeing the existing policy, or a new policy of the European Society.

All communications should now be addressed, and all premiums paid, to the European Assurance Society, at the office, 17, Waterloo Place, Mall Mall, where the Royal Naval Military and East India department will be conducted.

Should you, however, have been accustomed to pay your renewal premium through an agent, you will still be enabled to do so, as arrangements will be made by the European Society to continue the agents of the Royal Naval and Military Society.

The report of the European Society for 1855 shows that the annual revenue exceeds 330,000*l.*, that the capital subscribed by nearly 2000 shareholders exceeds 800,000*l.*, and that the new premium revenue for the year 1865 exceeded 62,000*l.*

The great advantages of uniting assurance companies are now being thoroughly recognised and appreciated by the public. They may be summed up briefly thus:—

The union of companies increases business, income, security and bonus, and decreases expenditure, competition, and the liability to fluctuation.

You will perceive at once the advantages which the consolidation of the Royal Naval and Military Society with the European Society will secure to you, as you not only have the security of the large annual income of the joint businesses for the amounts of your policies, and of the bonuses already declared upon them, but in all future divisions you will participate on an equality with all the other policyholders in the European Society and derive therefrom, in addition to the original benefits of your policies, the further advantages arising from accumulation of income and power with a diminution of annual expenditure.

My late colleagues and I think, therefore, that you will feel with us that in this arrangement your best interests have been considered.—I have the honour to be, yours faithfully,

Frederick Smith,
Chairman of the Royal Naval, Military, and East India Company Life Assurance Society.

To this circular was annexed the following circular from the European Society:—

To the Policyholders of the Royal Naval, Military, and East India Company Life Assurance Society.

European Assurance Society.
London, 18th Sept., 1866.

My Lords, Ladies, and Gentlemen,—The annexed letter from the chairman of the Royal Naval, Military, and East India Company Life Assurance Society announces to you that its business has been taken over, and its policies and other liabilities are now guaranteed by this society. The deeds already executed between the two societies render it unnecessary to trouble policyholders to send their policies for endorsement by this society. Should you, however, wish it, if you will forward your policy, either direct or through the agent to whom you have been accustomed to pay your premium, it shall be immediately (after the succeeding Thursday) returned to you endorsed, signed by three directors, and sealed with the seal of the society; or, if you prefer it, a guarantee policy, or a new policy of the European Society, will be issued in lieu of the one you now hold in the Royal Naval and Military Society. All policyholders are perfectly assured by this society under the renewal receipts issued at present, and the terms and conditions contained in the policies, together with all bonuses declared by the Royal Naval and Military Society, are guaranteed by the European Society.

The capital of this society, subscribed by nearly 2000 shareholders, exceeds 800,000*l.*, the annual income exceeds 330,000*l.*, and the invested funds and property amount to nearly three quarters of a million.

I would invite your special attention to the distinctive principles of the European Society, which present a powerful reason of the preference of assurers.

The public appreciation of these principles may be seen by the great increase in the new premium income.

(Here follow the amounts of the new premium income in various years.)

So that during the last eight years alone the new business of the company amounts to 301,000*l.*

Your position as a policyholder, I need scarcely remark, will be greatly improved by the arrangement now made. By the union of interests, and by the conduct of the joint business in one office and by one official staff, a very considerable reduction of expenditure will be effected, which must add considerably to the bonus; while the new business, large as it is at the present time, will be further increased by the concentration of interests and income.

It may also be gratifying for you to know that the European Society, and the other companies already united with it have paid, in claims to life policyholders including bonus additions, upwards of two millions sterling.

Henry Lake, Manager.

Mr. Swift took no notice of either of these circulars. His policy was not endorsed by the European Society, nor was it sent in for endorsement, nor was any guarantee or substituted policy issued in respect thereof. No bonus was ever received on the policy from the European Society. From 1866 to 1871 he paid his premiums to the European Society, and accepted receipts from them. The last two being in the following form:—

European Assurance Society,

E

consolidated the business of the Royal, Naval, Military, and East India Company Life Assurance Society.
Chief Office: 316, Regent-street, W., London.
(Royal, Naval, and Military Department), 17, Waterloo-place, Pall Mall, London, S.W.

Receipt No. $\frac{n}{m}$ 8615. Sum assured £1000.

Policy of Royal Naval and Military Society, No. 2638.
Received this 8th Jan. 1867, the sum of 8*l.* 12*s.* 8*d.*, being the payment of three months' premium, from the 27th Dec. 1866, for an assurance on the life of Captain W. A. Swift, effected by the before-named policy, and as now adopted and guaranteed by the European Assurance Society.

W. M. JONES, JAMES FURNELL } Directors.

Printed receipts for renewal premiums issued from the chief office are alone admitted as valid.

European Assurance Society.
Empowered by Special Act of Parliament.
Chief Office: No. 17, Waterloo-place, Pall Mall, London, S.W.

Premium £8 12*s.* 8*d.* On the life of W. A. Swift.
Received the 7th Jan. 1869, the sum above stated, being the amount of premium for the renewal of policy No. 2638, n and m, for three months from the 27th Dec. 1868, according to the tenor of the said policy.

G. BERMINGHAM, HENRY DEFFELL } Directors.

Printed receipts for renewal premiums issued from the chief office, and signed by two directors, will alone be admitted as valid.

The letters "N. and M." being, no doubt, an abbreviation of "Naval and Military Company."

In the winding-up Mr. Swift contended that he was entitled to claim on his policy against the company that granted it—the Royal Naval Society.

Kelly's case was exactly similar to Swift's case, except that Colour-Sergeant Kelly, on receiving the amalgamation circulars, had written to the Royal Naval Society two letters, in one of which he stated he did not approve of the amalgamation, and in the other that he did not wish to be transferred to another society.

Cracknall and *Henderson* for Mr. Swift and for Mr. Kelly.

Napier Higgins, Q. C. and *Montague Cookson*, for the official liquidators of the Royal Naval Society.—There was an absolute dissolution and annihilation of the Royal Naval Society. In the amalgamation the provisions of the deed of settlement were strictly followed; and this case differs from *Barnes's case* (*sup.* p. 72), and resembles *Carr's case, re the Waterloo Life, &c., Assurance Company* (33 Beav. 542), in that there was a valuation of the assets of the transferor society (clause 3, *sup.* p. 48). Moreover there was a novation by the policyholder with the European Society. The circulars were an offer of a new contract in substitution for the old. By going to the European Society and paying the premiums to that society, the policyholders accepted the offer, and accordingly can claim only against the European Society. With regard to Kelly's protest, there are cases in the Albert Arbitration, in which Lord Cairns held that such a protest, not being a continuing protest, did not prevent a novation.

Lord WESTBURY.—

There is no difficulty at all either in *Swift's case*, or in the Colour Serjeant's (*Kelly's*) *case*. Upon a former occasion (in *Barnes's case*, *sup.* p. 72) an attempt was made by Mr. Fischer to establish that what was done, under what was called a power of dissolution and transfer, amounted to an absolute out-and-out dissolution of the company—that is not to a dissolution of the company only as among the shareholders, but to an annihilation of the company not only as against the shareholders therein, but as against creditors who had entered into contracts with the company. I considered that very fully, and I had no difficulty in refusing to accede to it. I said, and I repeat, that that was not the true construction of what the directors were empowered to do, nor was it at all consistent with what they had done, and that what was appealed to as the power of dissolution, was no such power except as among the shareholders; and it provided expressly for this, that if at any time after the transfer effected by what was called dissolution, there should be a necessity of meeting the engagements which the company dissolving itself entered into, the company should be restored to life, and be armed again with its former machinery for conducting business and requiring payment by its shareholders, for the discharge of its unsatisfied liabilities. Of course Mr. Higgins has forborne repeating the arguments which were then decided against him; but he says that what has taken place under this alleged dissolution, has amounted in point of fact to a contract or the offer of a contract to each shareholder; and that the shareholder paying his premiums for the future to the European Society has accepted that offer, and has substituted the engagement of the European Society for the original contract of the assuring company. Well, such an argument cannot be maintained on the circulars at all, for the circulars expressly say that the business of the one company was to be united with the business of the other, and there are some words in the circulars, which say—the consolidation of the Royal Naval Society with the European Society will secure to you, as you have the security of the large annual income of the joint business, certain advantages. The transaction was therefore a very simple one. The business of the Royal Naval Society was transferred to the European Society, and for the purpose of making that transfer effectual, the Royal Naval Society came to a resolution among its own shareholders to dissolve the society; that was a mode of assuring the European Society that the business of the Royal Naval Society should not be carried on in a distinct form, but should be carried on in a consolidated form by the European Society; but then the letters, which announced to the policyholders what the companies were about to do, after saying that it was in accordance with the deed of settlement, say they are about to make an arrangement with another company for undertaking the obligation of the policies and securing the interests of the assured, and after telling the policyholders that they have made that arrangement, they go on expressly to tell them

> The terms and conditions of your policies remain, of course, unaltered by the arrangement, and although each policyholder is fully guaranteed for all claims under the present policies by the covenants of the European Society in the deeds between the two companies carrying out the arrangement, any of the assured desiring it may, for greater security either have an endorsement to that effect made on their policies, or may have a policy guaranteeing the existing policy, or a new policy of the European Society.

It is impossible, with any reason, to contend in the face of those words that the policy of the Royal Naval Society was henceforth to be a

defunct and inoperative contract, to have its place taken by a new contract with the European Society. The Royal Naval Society say just the contrary; all your engagements with us, with its terms and conditions, shall remain unaltered; we will only give you a further security for the fulfilment of those terms and conditions; and the security will be the guarantee of the European Society. If you like to have that guarantee expressed in words, it shall be so, and shall be expressed upon your policy. If you like to have a policy of guarantee, that is, a new policy guaranteeing the old, and thereby admitting the complete, independent, continuing existence of the old, you shall have it; or if you like, instead of the old, to have a new policy of the European Society, you shall have it. Now here are a variety of proposals made to the assured. Mr. Swift received this letter. Did Mr. Swift accede to any of these proposals? Which did he accede to? He acceded only to the proposal that the terms should remain unaltered. He did not write to the Royal Naval Society and say, "I should like to have a new policy of the European Society;" he did not write to say, "I should like to have an independent policy of guarantee;" he did not write to say, "I should like to have an indorsement;" he allows things to remain as they were, upon the assurance of the company, with whom he had contracted, that the terms and conditions of his contract should remain unaltered. It is idle to say that there was any new contract between the assured and the European Society. It is idle to say that the Royal Naval Society have any power of binding the assured to the European Society, and tacking them on to the European Society against their consent. They only endeavour to get the assured to acquiesce in what they were about to do by these three assurances: Your present contract shall not be affected, it shall only be improved by a new security being added; if you like to have that security expressed, it shall be done; it you like to have a new policy superadded to your old one, it shall be done; or if you like to give up the old and accept a new, it shall be done. But Mr. Swift did nothing of the kind. Mr. Swift took no notice of that; he did, as he was bound to do, go and pay his premiums to the European Society, because he was told distinctly that the business of the Royal Naval Society was united with the European Society, which is a representation amounting to this, that the Royal Naval Society would transfer its business to the European Society, to be consolidated with its business, and therefore, by virtue of that transfer, the European Society became the assignee and agent of the business of the Royal Naval Society, and was the proper recipient of all moneys that under the original contract with the Royal Naval Society were to be paid at the office of that company. What Mr. Swift did was, therefore, nothing in the world more than an acquiescence in the transfer of that business, and payment of the premiums in accordance with the notice he had received, amounting to no more than this—as if the Royal Naval Society had told him "Our bankers are henceforth the London and Westminster, or any other, please to pay your premiums into the London and Westminster Bank." He did pay his premiums to the assignee, agent and attorney of the Royal Naval Society; he did nothing more. There was nothing that you can fasten upon it. You cannot bind him by any other letters; for, though there were certain positions offered him, he accepted none. You can infer nothing from the payment of the premiums, even if there was not this direction and request of your own, that he should continue to pay the premiums to the persons that represent the transferees of the business. He did so in accordance with your request, and nothing results from the payment of those premiums, that can by any possible reason of law, or any possible argument, be made to result in the proof that Mr. Swift entered into a new contract with the European Society.

The same thing relates to the unfortunate Colour-Serjeant (Kelly), who trusted with natural instinct, and with a sort of divination of the result, to the name that he was accustomed to deal with, namely, the Royal Naval and Military Company. I cannot say his case is improved by protesting; but what I do say is, his case does not stand in need of the protest. He did nothing more than Mr. Swift had done, and the *ratio decidendi* in *Swift's case* applies to him also. Both those gentlemen must remain, as they originally were, policyholders of the Royal Naval Society, and creditors of that society, unaffected by the dealing with the European Society; and the attempt to fasten upon them a new character and a new contract, must be dismissed with costs.

Solicitor for Mr. Swift and Mr. Kelly, *W. T. Manning*.

Solicitors for the official liquidators of the Royal Naval Society, *Mercer and Mercer*.

Wednesday, Feb. 5.

THE NATIONAL BANK'S CASE.

Company — Winding-up — Petition to wind-up — Notice—London Gazette—Companies' Act 1862, *sect.* 153—*Question as to refundment of money paid by the directors between the presentation of the petition to wind up and the winding-up order.*

The directors of the E. Company paid a bonâ fide debt to the N. Bank on the 14*th June. On the previous day, the* 13*th June, a petition to wind-up the company was advertised for the first time in the London Gazette. This petition had been presented on the* 10*th June, and in the following January a winding-up order was made. In the winding-up the official liquidator contended that the money so paid ought to be refunded to the E. Company, the payment having been a void disposition of the property of the company under the* 153*rd section of the Companies Act, which provides that "all dispositions of the property, effects, and things in action of the company . . . . made between the commencement of the winding-up and the order for winding-up, shall, unless the court otherwise orders, be void."*

Held, that in exercising the discretionary power, enabling the court either to let the 153*rd section operate or to restrain its operation, the* ratio decidendi *was whether the recipient of the money had, or ought to have had, or might with reasonable diligence have had, a knowledge of the fact of the pendency of the petition to wind-up. It could not be inferred that the N. Bank had notice of the petition, when such inference was to be drawn merely from the fact that the petition was adver-*

evening anterior to the morning on which the debt was paid.

Semble, that the money would have to be refunded in cases where it could be said that the recipient of the money had, or ought to have had, or might with reasonable diligence have had, a knowledge of the fact of the pendency of the petition to wind-up.

THIS was a question as to the refundment of moneys paid by the directors of the European Society in the interval between the presentation of the petition to wind-up and the winding-up order.

In May 1870, the National Bank made a claim against the European Society in respect of two policies held by the bank; and on the 31st May, 1870, the bank was informed by the secretary of the society that the amounts assured by the policies would be payable in three months from the 10th May 1870, provided satisfactory evidence of the title should be furnished. Difficulties were, however, raised by the society as to the title of the bank, and a lengthy correspondence took place between the bank and the society, with respect to this. In the midst of this correspondence, repeated applications were made by the bank for payment of the amount assured by the policies, and ultimately, on Monday the 12th June 1871, the solicitors to the bank wrote to the secretary of the society as follows:—

Policies No. 6317 and 6247.

Are we to conclude that your society declines to discharge the claim of our clients, the National Bank, under these policies? We have received peremptory instructions to bring this matter to a conclusion, and, unless we hear from you on Wednesday morning, that you are prepared to pay the money forthwith, we shall, without further notice to you, prepare and file a petition to wind-up the society.

On the 13th June 1871 a reply was written by the secretary that the society were prepared to pay the money, and on the 14th June 1871 the solicitors to the bank attended at the office of the society and received 648*l*, 8*s*. 2*d*. in respect of the policies.

On the 10th June 1871 a petition was presented by Mr. Greenhough, a shareholder in the society, praying that the society might be wound-up. This petition was advertised for the first time in the *London Gazette* on the 13th June 1871, the day before the money was paid to the bank. The petition was ordered to stand over from time to time, and on the 17th Nov. 1871 provisional official liquidators were appointed by the Court of Chancery, and, finally, on the 10th Jan. 1872 an order was made to wind-up the society: (See these orders, *sup.* p. 51.)

There were various sums, amounting in the aggregate to more than 17,000*l*., that were paid by the directors after the presentation of the petition in respect of claims which had previously matured, and the official liquidators had been advised that they ought not to treat any of such payments as valid, without the sanction of the arbitrator.

They accordingly now contended that, under the 153rd section of the Companies Act 1862, this payment of the sum of 648*l*. 8*s*. 2*d*. was a void disposition of the property of the society; and that it ought to be refunded by the bank to the society. On the other hand the bank contended that the payment was a *bonâ fide* payment made by the society in the ordinary course of business, and in fulfilment of a legal obligation existing on the part of the society, and without any notice, on the part of the bank, of any petition having been presented to wind-up the society.

The provisions of the Companies Act 1862, referred to are the following:—

Sect. 84:

A winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding-up.

Sect. 86:

Upon hearing the petition the court may dismiss the same, with or without costs, may adjourn the hearing, conditionally or unconditionally, and may make any interim order or any other order that it deems just.

Sect. 153:

Where any company is being wound-up by the court, or subject to the supervision of the court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares or alteration in the status of the members of the company, made between the commencement of the winding-up and the order for winding-up, shall, unless the court otherwise orders, be void.

Sect. 163:

Where any company is being wound-up by the court, or subject to the supervision of the court, any attachment, sequestration, distress, or execution, put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents.

Sect. 164:

Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property, as would, if made or done by or against any individual trader, be deemed, in the event of his bankruptcy, to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound-up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section the presentation of a petition for winding-up a company shall, in the case of a company being wound-up by the court, or subject to the supervision of the court, and a resolution for winding-up the company shall, in the case of a voluntary winding-up, be deemed to correspond with the Act of Bankruptcy in the case of an individual trader. . . .

Napier Higgins, Q. C. and *Montague Cookson* for the official liquidators.—Under the 84th section of the Companies Act, the commencement of the winding-up dates from the presentation of the petition. And sect. 153 explicitly enacts that all dispositions of property, &c., made between that date and the winding-up order, shall be void. Under the 163rd section, no proceedings could then be taken against the society by anyone claiming payment. And under the 164th section, no act done by the directors can give priority to any creditor, where the funds of the company are to be distributed *pari passu* among all the creditors of the company. Whether the payee had notice of the petition or not, the payment is void. And here he must be held to have been affected with notice, for publication in the *London Gazette* is notice to the whole world. Great danger might result from its being supposed that any payment of this kind could be maintained, simply because there was a postponement of the hearing of the petition.

[Lord WESTBURY.—I quite agree with you; therefore it was that I said at the commencement, the manner in which the petition was dealt with has been productive of evil and perhaps an immense quantity of injustice. See the cases of fraudulent transfers that we have now to deal with. The ordering of the petition to stand over was, as it were, a warning to all the people to get out of the net that threatened to engulph them;

and so they did—many of them. There are also a number of bankruptcy cases, in which they sought to release themselves by the operation of bankruptcy, in which they were helped by the official liquidators in some cases going in to prove under the bankruptcy.]

W. W. Karslake appeared for the National Bank, but was not called upon.

Lord WESTBURY.—

I am desired to recall money that was paid in discharge of a *bonâ fide* debt. Now when an application is made for that purpose, you must show that the creditor receiving the money knew, or ought to have known, at the time, that the person paying it had no right to make that payment, and that he was receiving money, which already belonged to other persons, or had received by law a different destination. The Act, I am happy to say, gives a large discretion to the court, and the court ought to exercise that discretion in conformity with what is just and right, and in conformity also with the rules that prevail in the analogous proceeding in bankruptcy. Now, I have pressed again and again for an answer, whether there was anything whatever that affected the creditor, who received this money, with notice at the time, that the directors, who paid it, had no longer a legal capacity to do so. And Mr. Higgins has very fairly answered me:—"I am not in a position to say that there was anything but the notice in the *London Gazette*." The *London Gazette* used to be published late in the evening. I think it is so now. It was published late on the evening of the day preceding the day of payment; the *London Gazette*, therefore, issuing in the evening, three or four hours would probably intervene between the time when it might be expected to be seen by the creditor or the solicitors of the creditor, and the time of payment; and Mr. Higgins has told me it is explicitly enacted, and it is the unquestionable law, that the issuing of that *Gazette* is notice to the whole of the world, and that notice therefore from the incident of publication will be imputed to parties, who, if they had read the *Gazette*, would have had actual information of the fact of the presentation of the petition. Now I do not consider that to he the law, and, independently, I will not accept it as the law in a proceeding of this kind. The rule of law is that, where a party may, after a certain period of time, be reasonably presumed to have seen, read, or heard, he shall be in some proper cases fixed with knowledge, although the fact of his having so read, or seen, or heard of the information, cannot be brought home to him. But I think I should be doing the most ridiculous thing in the world, if I fixed upon the National Bank, or on the solicitors of the National Bank, individual notice of the fact of the presentation of the petition, from the circumstance that the *Gazette*, containing that notice, had been issued to the world three or four hours previous to the time when the payment was made. That is not the law for this purpose; the law is only that that shall he attributed to a man, which he may be reasonably supposed to have become acquainted with.

The state of things is the more lamentable, partly from what the court has done, and partly from what it has omitted to do. When the court directed this petition to stand over, at the same time in condemnation of that act recording its conviction that the company was insolvent; and when the court knew afterwards, on granting the winding-up order, that the petition had stood over for more than six months, and that in the interval of time a great number of transactions had taken place necessarily and evidently properly in the conduct of the business of the company, the court was empowered and ought, when it pronounced the order, to have taken care to have provided that all *bonâ fide* transactions and all *bonâ fide* payments made in the interval, at all events between the date of the petition and the appointment of the official liquidator, should not be disturbed. Now the Legislature armed it with that authority, for when it laid down in the 84th section that

> A winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding-up,

the court is invested with the right to qualify that retrospective operation, and it is accordingly enacted in the 86th section that

> Upon hearing the petition the court may dismiss the same with or without costs, may adjourn the hearing, conditionally or unconditionally, and may make any interim order, or any other order, that it deems just.

Well, then comes the enactment, which, it is said, has the effect of the retrospective operation of the order, and for that purpose I am referred to the 153rd section, and there it is said—

> Where any company is being wound-up by the court, or subject to the supervision of the court, all dispositions of the property, effects, and things in action of the company—

Whether that does or does not include the actual payment of a *bonâ fide* debt may admit of very great doubt; taking the words "effects" and "property," and so on, it would be very difficult to hold that the payment of a *bonâ fide* debt is the disposition of the property, or effects, or things, in action of the company. However, let that pass.

> and every transfer of shares, or alteration in the *status* of the members of the company made between the commencement of the winding-up and the order for winding-up, shall, unless the court otherwise orders, he void.

That discretionary power of limiting the operation of the enactment, of exempting any particular thing out of the operation which, on the rules of natural justice, and as I have said, by the analogous rule in bankruptcy, ought to be protected—that discretionary power would enable me to deal with this application, either by letting the section operate, or by restraining the operation of the section, according as equity would suggest. Now, I cannot say that it must be paid back; for of course the *ratio decidendi* must be that the recipient had notice that it was not the money of the party paying him, but was money stamped with another destination; if the *ratio decidendi*, if the point in the case be that, I must ascertain that he had, or ought to have had, or might with reasonable diligence have had, a knowledge of the fact of the pendency of this petition, I should then probably be bound to say that it must be paid hack, not perhaps irrevocably, but it must be paid back, and you must make the best of an application to the court. However, I will not take from him that which he honestly received. The debt was one, be it observed, that was completely matured before the presentation of the petition; the debt was one which, but for the evasive delay, ought to have been paid by the directors before any petition was heard of. The debt was one, therefore, which the creditor had a

right to claim the payment of; he has not claimed it in any manner that appears to me to involve any notion of the fact that there was a petition pending. I cannot take it back from him, therefore, unless I am convinced that he did not honestly receive it. I mean by "honestly," that he received it without a suspicion or any notion that the directors had not full power to pay it. Now, I dare say there are many cases that will stand very differently from this. I confine my decision in this case to the point, that I will not infer that the National Bank, or its solicitors or agents, had notice of the pendency of the petition, when I am asked to draw that inference merely from the fact that the *London Gazette* had been published at nine o'clock in the evening anterior to the morning when they received this payment. You must pay the costs of this application, Mr. Higgins, out of the European Estate.

Solicitors for the National Bank, *W. Tatham* and *Son*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

Feb. 5 *and* 6.

CARPMAEL'S CASE.

Life assurance company—Amalgamation of Companies—Winding-up—Policy—Novation of contract—Advertisement held to be notice of winding-up order—Indorsement on policy as to a change in the sum assured—Policyholder held, after an amalgamation, to be a creditor, not of the old company, but of the new—Procedure in a winding-up, where the order was made before the Companies Act 1862.

The W. Assurance Company transferred its business to the B. Assurance Association in Oct. 1860. *Subsequently, in June* 1862 *an order was made to wind-up the W. Company on a petition presented by a creditor in Dec.* 1861. *Advertisements were accordingly issued in July* 1862 *calling on creditors of the W. Company to come in and prove their debts before the Vice-Chancellor, and stating that, until they should so come in, they would be precluded from commencing any proceeding for the recovery of their debts. The W. Company was, however, never wound-up finally. In* 1865 *the B. Association transferred its business to the E. Society.*

In 1849 *the W. Company had granted a policy to C. and another, patent-agents, on the life of N. After* 1860 *the premiums on this policy were paid to the B. Association, and receipts accepted from them; and after* 1865 *the premiums were paid to the E. Society, and receipts accepted from them.*

In 1872 *the executors of C. held the policy, and brought in a claim on it against the W. Company. They alleged that C., the assured, had never any knowledge of the winding-up order, or of the advertisement, and that the premiums had been paid to the other companies, as agents authorised to receive them.*

Held, that under the circumstances knowledge of the advertisement and the winding-up order must be imputed to him, and the order to wind-up the W. Company put an end to any authority that had been given to any other company to receive their premiums.

Accordingly, the premiums having been paid to the B. Association, and receipts accepted from them, the contract with the W. Company had been abandoned, and a contract with the B. Association taken in its place.

Moreover, it had been discovered in 1868 *that the "life" was two years older than was stated in the proposal for the policy, and one of C.'s executors had drawn attention to this, and had allowed an indorsement to be placed on the policy, that the sum assured should in consequence of such difference in age be reduced by* 24*l.* 18*s. This indorsement bore the signatures of "Reginald Read, director" and "Henry Lake, general manager." Mr. Read was a director of the E. Society, and had been a director of the W. Company, and Mr. Lake was the General Manager of the E. Society.*

Held, that this indorsement, coupled with the previous correspondence, would of itself constitute a new agreement, accepting the E. Society in substitution for the original company.

Thus there had been a novation, and the executors were entitled to rank as creditors of the E. Society only.

Where a creditor proves his claim against a company, with regard to which an order to wind-up has been made before the passing of the Companies Act, 1862, *but the winding-up has not been completed finally, a supplemental order to wind-up will be made, founded to a certain degree on the previous order, and upon the terms of not disturbing anything that has been rightly done under that order.*

THE English Widows' Fund and General Life Assurance Association was constituted under a deed of settlement, dated the 29th Oct. 1847, and was registered and incorporated under the Act for the Registration of Joint Stock Companies, 7 & 8 Vict. c. 110. The deed of settlement contained clauses providing for the dissolution of the association, and for the transfer of the business to some other assurance company. (Clause 258 of the deed is similar to the first twenty-eight lines of clause 173, *sup.*, p. 47.)

In the year 1860 negotiations were set on foot for the transfer of the business of the English Widows' Fund, &c., Association to the British Nation Association, which under its deed of settlement had the power of purchasing the business of another assurance company. (Clause 45, *vide sup.* p. 40.)

The following resolutions were passed at a special meeting of the shareholders of the English Widows' Fund Association on the 29th Oct. 1860, and were subsequently confirmed:—

1. That the contract first read and signed by the directors of the English Widows' Fund Association, and the directors of the British Nation Life Assurance Association, be and the same is hereby approved.

2. That the English Widows' Fund Association be and the same is hereby dissolved.

The transfer of the business was carried out by an agreement dated the 29th Oct. 1860, being the contract referred to in these resolutions. By this deed it was agreed that the British Nation Association should purchase the life assurance and annuity business of the English Widows' Fund Association and the benefit and advantage of their policies, and all premiums and other moneys that might become due after the 15th Oct. 1860. The British Nation Association also undertook to pay the sums assured by all policies of the English

Widows' Fund Association; and further, to pay 3000*l.* and certain other sums in consideration of the transfer of the business.

On the 14th June 1862 an order to wind-up the English Widows' Fund Association was made by the Court of Chancery on the petition of a creditor, presented on the 21st Dec. 1861, and intituled "In the matter of the Joint Stock Companies Winding-up Act 1848, and the Joint Stock Companies Winding-up Amendment Act 1857;" and on the 23rd July 1862 Mr. Harding was appointed official manager. On the 2nd July 1862 the following advertisement was approved of by the chief clerk:—

In Chancery:

In the matter of the Joint Stock Companies Winding-up Acts, 1848 and 1849, and the Joint Stock Companies Winding-up Amendment Act, 1857; and

In the matter of the English Widows' Fund and General Life Assurance Association,

Notice is hereby given that all parties, claiming to be creditors of this association, are to come in and prove their debts before the Vice-Chancellor Sir William Page Wood, the judge of the High Court of Chancery charged with the winding-up of this association, at his chambers, No. 11, New-square, Lincoln's-inn, in the county of Middlesex; and until they shall so come in, they will be precluded from commencing or prosecuting any proceeding for the recovery of their debts.

Dated this 2nd July, 1862.

EDWARD WEATHERALL, Chief Clerk.

This advertisement was inserted in the *London Gazette* on the 4th and 8th July, 1862; in the *Times* and *Standard* on the 4th, 8th, and 11th July, 1862; in the *Norwich Union* on the 5th July, 1862; and in the *Exeter* and *Plymouth Gazette* on the 4th July, 1862. The association was, however, never wound up finally.

In the year 1865, the British Nation Association transferred its business to the European Society: (*vide sup.* p. 41.)

In 1849, Mr. Poole and Mr. William Carpmael, who then carried on business in partnership in London as patent-agents, had effected a policy of assurance in the English Widows' Fund Association, on the life of Mr. Nicholson. Both Mr. Poole and Mr. William Carpmael had since died, the latter being the survivor, and the policy was now held by his executors, Sarah Carpmael, William Carpmael jun., Alfred Carpmael, and Arthur Carpmael. No proof was ever made on the policy against the English Widows' Fund Association in the winding-up of that association, nor was any notice whatever taken of the advertisement. After the amalgamation of the English Widows' Fund Association with the British Nation Association, the premiums were paid to the latter, and receipts accepted from them. After 1865 the premiums were paid to the European Society, and receipts accepted from them. The following are the forms of the receipts on different occasions:—

Receipt for 1861.

British Nation Life Assurance Association, with which is united the English Widows' Fund.

Chief Offices: 291, Regent-street, London.

Receipt No. 7699. 15th June, 1861.
Policy No. 257. Sum assured 300*l.*

Received of Messrs. Poole and Carpmael the sum of sixteen pounds fifteen shillings and pence, being the payment of annual premium, from the 3rd day of June 1861 to the 2nd day of June 1862, for an assurance of the sum of 300*l.* on the life of Mr. William Nicholson, effected by the before named policy. HENRY LAKE, Manager.

16*l.* 15*s.* 0*d.*

Countersigned, JNO. MADDEN, Cashier.

Receipt for 1865.

British Nation Life Assurance Association, in union with the European Assurance Society.

Empowered by Special Act of Parliament.

(E. W. F.)

Offices, 316, Regent-street, and 2, Waterloo-place, Pall Mall, London.

Receipt No. 13,284. Sum assured 300*l.*
Policy No. 257.

Received this 21st day of June 1865, the sum of sixteen pounds fifteen shillings, being the payment of one year's premium from the 5th June 1865 to the 5th day of June 1866, for an assurance on the life of William Nicholson, effected by the before named policy.

HENRY LAKE, Manager.

Countersigned, W. SEYMOUR, Cashier.

Receipt for 1870.

No. 44,036.

European Assurance Society.

Empowered by Special Act of Parliament.

Chief Office, 17, Waterloo-place, Pall Mall, London, S.W.

Premium, 16*l.* 15*s.* 0*d.* On the life of W. Nicholson, E.W.

Received the 30th day of June 1870, the sum above stated, being the amount of premium for the renewal of policy No. 257 for twelve months from the 5th day of June 1870, according to the tenor of the said policy.

J. M. F. SMITH, } Directors.
REGINALD SMITH, }

Countersigned, H. TEMPLETON.

In 1867, Mr. Wm. Carpmael, jun., a son and one of the executors of Mr. William Carpmael, wrote as follows:—

Henry Lake, Esq. 17th June 1867.

Dear Sir,—I am desirous of selling the life policy of William Nicholson, No. 257, and shall be obliged by your informing me what the European Assurance Society are disposed to give for it.—I am yours truly,

WILLIAM CARPMAEL.

I enclose you printed notice of the premium coming due

No answer having been sent to this letter, Mr. Wm. Carpmael, jun., wrote again:—

H. Lake, Esq. 1st July 1867.

Dear Sir,—I wrote you on the 17th ultu., relative to the disposal of William Nicholson's life policy, but have not been favoured with a reply. If you will send me an answer per bearer, and at the same time inform me the last day for paying the premium thereon, I shall feel obliged.—I am yours, WILLIAM CARPMAEL.

The secretary wrote in reply:—

European Assurance Society.

Re Policy No. 257, Nicholson. 1st July 1867.

Dear Sir,—I have the pleasure to forward official receipt for premiums on the above policy, sent with your favour of this day's date.

In reply to your inquiry I have to inform you that we can allow 88*l.* 13*s.* for the surrender of the policy.—I am, dear Sir, yours faithfully,

W. Carpmael, Esq., J. HAMER EWENS, Secretary.
21, Southampton Buildings.

In June 1868, after the death of Mr. William Carpmael, it was discovered by Mr. W. Carpmael, jun., one of the executors, that a mistake had been made as to the age of Mr. Nicholson, on whose life the policy was granted. He communicated this to Mr. Lake, and the following correspondence ensued:—

European Assurance Society.

W. Carpmael, Esq.,
Southampton Buildings, Chancery Lane.

16th June 1868.

Dear Sir,—In accordance with your wish, I beg now to inform you, with reference to Policy No. 257 (Nicholson), in consideration of his being two years older than stated, we will reduce the sum assured to 275*l.* 2*s.*, and the premiums to remain the same.—Awaiting your instructions in this matter, I am yours faithfully,

HENRY LAKE, General Manager.
Per J. B. R.

The reply was:—

Southampton Buildings, Chancery-lane, W.C.

H. Lake, Esq. June 17, 1868.

Dear Sir,—W. Nicholson, Policy 257.—We accept the

terms proposed in your letter of yesterday with reference to this policy, and shall feel obliged by your having the alteration indorsed on the policy.

We enclose a cheque for the premium now due, a receipt for which will oblige

Yours truly,

WILLIAM CARPMAEL, for
SARAH CARPMAEL, and others.

The following memorandum was accordingly indorsed upon the policy:—

It having been proved by baptismal certificate that the within-named William Nicholson was two years older at the time of assuring than stated in the proposal referred to herein, it is hereby declared that, in consequence of such difference in age, that the sum assured payable in respect of this policy shall be reduced to two hundred and seventy-five pounds and two shillings; the yearly premium hereinmentioned remains unaltered.

The age of the within-named William Nicholson is hereby admitted. REGINALD READ, Director.

Dated this 25th June, 1868.

Entered G. G.

HENRY LAKE, General Manager.

Mr. Reginald Read was at this time a director of the European Society, but had formerly been a director of the English Widows' Fund Association, and Mr. Henry Lake was the general manager of the European Society, having previously been general manager of the British Nation Association, but he held no office in connection with the English Widows' Fund Association.

The executors now stated that the assured never had any knowledge of the order of the 14th June, 1862, to wind-up the English Widows' Fund Association, nor of the advertisement that was issued. Mr. William Carpmael, jun., also stated that, by having the indorsement placed on the policy, he had no intention of varying the terms of the contract, further than was necessary for the purpose of correcting the mistake as to the age of Mr. Nicholson, and that he had no intention of entering into a new contract by way of substitution or novation.

The executors now claimed to rank as creditors against the English Widows' Fund Association

1. For such a sum of money as may be adjudged and considered as sufficient and proper compensation for the assured, for the breach by the association of their contract, and their inability to perform the same—or at least,

2. For such a sum of money as the claimants would have been entitled to receive by or in respect of the policy, if they had brought their claim thereon against the association within the time prescribed by the advertisement for creditors of that association to bring in their proofs, or as would have been adjudged or considered as sufficient and proper compensation to the assured for the breach by the association of such contract, and their inability to perform the same if such claim had been brought in within the time so limited.

And if it were held they were entitled only to the second claim, then they further claimed either that the British Nation Association and the European Society had received the premiums rightfully, and had become liable, as guarantors of the English Widows' Fund Association, to pay the present value of the policy, less such a sum as might be paid by the English Widows' Fund Association, or that they had received the premiums wrongfully and were liable to refund them.

Fooks, Q.C., and *E. Carpmael* for the executors.—The policy is still a subsisting policy in the English Widows' Fund Association. The assured never brought in a claim under the winding-up of that association, because he never knew anything about the order to wind-up. The premiums were paid to the British Nation Association, and afterwards to the European Society, as the authorised agents of the English Widows' Fund Association. It cannot be said that the order to wind-up was a revocation of the authority previously given to the British Nation Association to receive the premiums.

Napier Higgins, Q.C. and *Montague Cookson* appeared for the official liquidators of the European Society, but were not called upon.

Thursday, Feb. 6.

Lord WESTBURY.—

When this case was opened to me yesterday on behalf of the claimants, it appeared to me to be attended with many technical difficulties, arising from the fact that it was desired to wind-up this company under an order made by the Vice-Chancellor Wood, as long ago as the 14th June, 1862. Now the winding-up directed by that order would of course proceed upon the state of the law which then existed. At that time the Companies Act 1862 had not come into operation or effect; consequently, the limited and very imperfect powers for winding-up the company, given by the anterior statutes, would be all that could be referred to in carrying the order into effect, It ought to have occurred to me that, if the claimant had merits, I could easily provide the necessary machinery requisite for winding-up effectually, by making a supplemental order to wind-up, founded to a certain degree upon the Vice-Chancellor's order, and of course upon the terms of not disturbing anything that had been rightly done under that order. That removes all the difficulty that I felt. I mention it for the purpose of stating, if there be any other case such as this, what would be the course, that I should take, to add to an order to wind-up, made previous to the present statute of 1862—the course that I should take in providing the means for carrying that order completely into effect.

I come now to the merits of this application. The order of the Vice-Chancellor was made on the 14th of June 1862; it was published in the *London Gazette*, and also in several papers; the publicity required by the law was given to that order. I see it was published twice in the *Gazette* in July 1862; it was published in the *Times* and the *Standard* three times in July 1862; in the Norwich Union papers on the 5th July 1862; in the *Exeter and Plymouth Gazette* on the 4th July 1862. Now the survivor of the two gentlemen who effected this policy was then alive. He was a gentleman intimately connected, by reason of his business, with the legal profession, and more especially with the equity bar. He was a man of great intelligence, great attention to business, and not at all a person likely to be non-observant of matters that affected a portion of his property by proceedings in the courts of justice. Now, that gentleman lived, I think, until the year 1867; therefore, there were at least five years after the making and the publication of this winding-up order. His son, the executor, now comes forward and says that, to the best of his belief, his father had no knowledge whatever of these proceedings in the Vice-Chancellor's Court, affecting the company with whom he had negociated and effected this policy. No doubt that gentleman speaks the truth according to his belief; but it is by no means a sufficient statement to induce me to repel the inference, that must arise upon these publications, that I have named, and the notoriety of the proceedings—that Mr. Carpmael must have notice

imputed to him of the making of that order and the proceedings under it. Now Mr. Carpmael appears from and after that time to have paid the premiums on his policy to the persons who had taken a transfer of the business, or or of the contracts which had been made with the English Widows' Fund Association. That was, in the first place, the British Nation Association; in the second place, the European Assurance Society. Mr. Carpmael paid the premiums upon this policy to the British Nation Association in the first instance. The contention on the part of Mr. Fooks is, that he paid them to the British Nation Association as the agents, as the persons authorised by the dealing between the British Nation Association and the English Widows' Fund Association to receive those premiums. Well, unfortunately, the moment the winding-up order was made, any such authority came to an end. The contention before me is, that the English Widows' Fund Association was treated by Mr. Carpmael as an existing society, and that in paying his premiums to the British Nation Association he did so under the belief that the British Nation Association had still an authority from the English Widows' Fund Association to receive those premiums. Now it is quite clear that, if I am right in imputing to him from the advertisements notice of the winding-up order, he could not have acted under that impression, for he must have known, and his advisers, if he wanted advisers on the matter (which I do not think he did), must have known, that the winding-up order had put an end to the authority contained in the antecedent contracts; supposing there was authority to receive the premiums as money payable to the English Widows' Fund Association, he must have known that that authority had been put an end to by the operation of the winding-up order. From and after that order, everything payable to the English Widows' Fund Association would have to be paid to the manager of that association; or, at all events, if the manager was not entitled to claim them as belonging to the English Widows' Fund Association, the authority to receive them by the British Nation Association as the agents of the English Widows' Fund Association would be entirely at an end. My impression and conviction, therefore, are that when the order was made, of which I must fix Mr. Carpmael with notice, Mr. Carpmael thought it wise and right to abandon the English Widows' Fund Association, and to elect to take the substitute for them, namely, the British Nation Association. Any argument, therefore, derivable from the supposition that Mr. Carpmael continued to pay the premiums to the British Nation Association, as having the authority of the English Widows' Fund Association, is, I think, entirely at an end. But now I do not mean to rest my decision upon that ground, although it would be quite sufficient for the decision I propose to make. But the next thing that we come to is the transaction between the two companies; and here again Mr. Carpmael, the executor, makes oath that he does not believe his father was aware of the nature of that transfer, or of the fact of the contract between the two companies; so at least I understand his affidavit. Well, but that is a representation of Mr. Carpmael's belief; I know not on what that belief is founded, but I am quite sure that any ground for that statement is entirely removed by the correspondence, that passed between Mr. Carpmael and his executors and the British Nation Association and the European Society. It is idle to contend that any gentleman receiving those letters headed as they are—I think first the receipts and afterwards the letters, "The British Nation," and then afterwards headed "The European Assurance Society"—it is idle to suppose for a moment that a gentleman of intelligence would not of course infer, if he had not already known it, from the heading of those letters, that he was no longer dealing with the original society, but was dealing with a substituted society. Well, in that state of things comes the material transaction, upon which my decision is founded. Mr. Carpmael's executor discovered the mistake in the terms of the policy, and he applied to the manager of the European Assurance Society to correct that mistake. There was some power of correcting mistakes of that kind, reserved by the original indorsement upon the policy—the terms that are, I think, indorsed at the back of the policy. Well, that mistake having been discovered, the proposal is made by the one side, and accepted by the other, that there shall be a most material alteration in the contract, and that the sum of money shall be reduced by reason of the age of the assured person being two years more, I think, than the age at which it was represented. That is carried into effect by this indorsement, which is a new agreement which was made upon the policy:—

> It having been proved by baptismal certificate that the within-named William Nicholson was two years older at the time of assuring than stated in the proposal referred to herein, it is hereby declared that in consequence of such difference in age the sum assured payable in respect of this policy shall be reduced to 275*l.* 2*s.* The yearly premium herein mentioned remains unaltered. The age of the within-named William Nicholson is hereby admitted.

Then that is signed by a gentleman of the name of Reginald Read. Some attempt is made by the claimant to suggest that as he, Reginald Read, had been a director of the English Widows' Fund Association, he was regarded by the parties as signing still in that capacity. It is impossible to accept that. I have already stated it is impossible for me not to impute in law to Mr. Carpmael knowledge of the winding-up order. But even that excuse, slight as it is, is wholly removed by the fact that Reginald Read was, at the time of this indorsement, a director of the European Society, and by the fact that Henry Lake is described here as "General Manager," and he was the general manager of the European Society at the time, and a gentleman with whom the correspondence had taken place, that terminated in the agreement recorded by this indorsement. Now I am extremely unwilling, and shall always remain unwilling, to transfer one policyholder from his original company to another company, unless I have clear and indisputable proof that the policyholder did deliberately elect to take the second company in lieu of the former, that must be founded upon facts and circumstances that unmistakeably warrant that conclusion. And what have I got here? I have got a company that has been wound-up, notoriously wound-up, or ordered so to be, at least six years before the date of this indorsement. During those six years I find premiums that have become due on the policy, paid not to any representative of the original company, but to the

company who had bargained for a transfer of its business and its engagements. I find that which is quite plain, that this gentleman, a man of great intelligence, must have considered that it was for his benefit to give up the insolvent company, and to take to what he believed to be the solvent company; and all his actions evidence that. Then I find that capped and concluded by a deliberate agreement with the transferee company, altering the terms of the original policy, and in effect substituting a new contract for the old. There can be no doubt that this is a case, therefore, in which all liability of the original company has been abandoned and given up, and, in lieu and substitution for the same, the engagement of the transferee company has been accepted. There has been great courage in making this application. I dare say that it was an application, that it was desirable for the estate of Mr. Carpmael to have made, that the question might be concluded, and therefore the executors, I dare say, felt themselves justified, and properly justified, in making it. But it was a hopeless thing, under the circumstances; and I must dismiss the application with costs, to be paid by the executors.

Solicitors for Mr. Carpmael's executors, *Wilson, Bristow*, and *Carpmael*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

Thursday, Feb. 6.

Bentinck's Case.

Company—Winding-up—Contributory—Rectification of register—Incomplete transfer of shares—Approval by directors of proposed transferee inferred from their silence.

A contract to transfer shares, which had not been carried into effect through default of the directors, carried into effect in the winding-up by the substitution of the transferee's name for the transferor's in the register.

The provisions in the deed of settlement of the E. Company, for the transfer of shares, were that a shareholder, wishing to transfer his shares, was to give to the directors notice of his wish, and to request the directors to certify their approval or disapproval of the proposed transferee, and such notice was to describe the full name and the profession or calling, and the place of abode of the proposed transferee, and if the proposed transferee should be approved of, or if the directors should not within fourteen days propose some other person to take the shares at the market price (in which case the person so proposed should be considered as approved of by them) then the shareholder might, according to a form to be sanctioned by the directors, transfer his shares to his own proposed transferee, who thereupon should, on executing at the office of the company, or at some other prescribed place, the deed of settlement, or a covenant to abide by the provisions of the deed, be entitled to call upon the directors to place his name on the register of shareholders as the proprietor of such shares; and no share was to be transferred to any person, who had not been first approved of or considered as approved of by the directors; and if any transfer should be made, or attempted to be made, to any person who had not been so first approved of, such transfer was to be void.

On the 10th April 1871, B., who held 545 shares in the society, sold 500 to H., and requested the society to take proper steps for transferring them to H. in their books. He was told in reply that a formal notice of a wish to transfer must be sent by him, and that, when it was approved of, a form of transfer would be sent. He sent the notice on the 13th April to the society, together with the certificates and six shillings in stamps. On the 22nd April, in reply to an inquiry as to the receipt of these, he received a telegram—"Notice, certificates and stamps duly received; will be attended to on the 25th April." On the 24th April he executed a transfer of the shares to H. in consideration of 37l. 10s., but not in the form required by the directors. On the 26th April his solicitor called at the society's office, and was informed that "the notice would be laid before the directors that day." On the next day, he was told that "inquiries were being made in the country as to the responsibility of H." On the 28th April, being the day of the expiration of fourteen days from the receipt of the transfer notice, the solicitor again called at the office and tendered the transfer for registration; but it was merely copied. On the 3rd May, he was told that the directors had decided not to accept any more transfers, until they had taken the opinion of counsel. On the 10th June, the successful petition to wind-up the society was presented; and on the 26th June, B. was informed by the secretary that "no transfer can possibly be passed until after the petition before the Vice-Chancellor has been dismissed." In January of the following year, the order to wind-up was made. B.'s name was still on the register; and it was placed by the official liquidator on the list of contributories. On his applying to have his name removed from the list, it was

Held that it must be removed. Within the fourteen days after the receipt of the transfer-notice, the directors expressed no intimation of their unwillingness to accept H. as a transferee; they must, therefore, be considered to have approved of H.; and thereupon a right to transfer to him arose to B. The informal transfer, that was executed, would not be treated as a transfer, but as evidence of a contract for valuable consideration between B. and H. This contract would have been carried into effect but for the default of the directors. Since the order to wind-up the company, the contract could not be carried into effect by following the regulations of the deed of settlement; and the only way of carrying it into effect was by substituting H.'s name for B.'s on the register.

The same was held with respect to the remaining forty-five shares, of which a similar transfer was executed by B. to H. on the 3rd May 1871; and with respect to which, B.'s solicitor had on the same day tendered the transfer for registration at the offices of the society.

A call having been made on the shares on the 20th May 1871, it was ordered that the alteration in the register should be made, only upon B.'s paying this call without interest, within three weeks from the date of this order.

This was a question as to an incomplete transfer of shares.

The deed of settlement of the European Assurance Society provided in clauses 96 and 97, that any shareholder might give notice in writing to the directors of his wish to transfer his shares, and request them to certify their approval or disapproval

of the person to whom he proposed to transfer the shares; in the notice he was to describe the full name, and the profession or calling, and the place of abode of the proposed shareholder; and, if such person should be approved of, or if the directors should not within fourteen days propose some other person to take the shares, proposed to be transferred, at the then market price (in which case the person so proposed should be considered as approved of by them), then the shareholder might, according to a form to be sanctioned by the directors, transfer the shares to his own proposed transferee, who thereupon might, on executing at the office of the company, or at some other prescribed place, the deed of settlement or a covenant to abide by the provisions of the deed, be entitled to call upon the directors to place his name on the register of shareholders, as the proprietor of such shares; and no share was to be transferred to any person who had not been first approved of or considered as approved of by the directors; and if any transfer should be made, or attempted to be made to any person who had not been so first approved of, such transfer was to be void (*vide* clauses 96 and 97 *sup.* p. 11.)

On the 10th April 1871, Mr Bentinck, who held 545 shares in the society, sold 500 of them to Mr. Hardman: and thereupon wrote to the secretary of the society, giving information of the sale, and requesting that proper steps might be taken for having the shares duly transferred in the books of the society. On the 12th April 1871 he received the following letter in reply:

Dear Sir,—I have your letter of 10th instant, and note contents. If you will return me the transfer-notice duly completed, it shall be laid before the next transfer committee, and when approved, a form of transfer will be sent you. Yours faithfully, D. EASUM, Secretary.

Mr. Bentinck filled up the transfer notice on the 13th April 1871, and sent it to the secretary, together with 6*s.* in stamps, and the certificates of the shares. On the 22nd April, Mr Bentinck had received no reply, and accordingly telegraphed to the secretary to know whether the documents had arrived; and the following telegram was received from the secretary in reply:—

22nd April 1871.

Notice, certificates and stamps duly received; will be attended to on Tuesday next. An oversight in not writing.

This Tuesday was the 25th April 1871.

On the 24th April 1871, Mr. Bentinck procured an ordinary form of transfer, and filled it up and executed it. He thereby, in consideration of 37*l.* 10*s.*, transferred 500 shares in the society to Mr. Hardman, who also thereby agreed to accept the same.

On the 26th April 1871, Mr. Bentinck's solicitor called at the office of the society with reference to the transfer and saw the secretary, who told him "that the papers respecting such transfer were all right, and that the notice would be laid before the directors on that day."

On the next day, the 27th, the solicitor called again at the office and was told by the secretary that "inquiries were being made in the country as to the responsibility of Mr. Hardman." On the 28th April, being the day of the expiration of fourteen days from the receipt of the notice of transfer, the solicitor again called at the office and tendered the transfer of the shares for registration, but the secretary merely took a copy of the transfer.

With regard to the remaining forty-five shares, on the 24th April 1871, Mr. Bentinck executed a transfer (similar to the other one) of these forty-five shares to Mr. Hardman in consideration of 3*l.* 7*s.* 6*d.*

On the 3rd May 1871, the solicitor went to the office and handed to the secretary a formal notice of the wish to transfer these forty-five shares to Mr. Hardman, together with the certificates of the shares. The secretary accepted the notice and certificates, and, as the solicitor now alleged, "admitted that a sufficient tender of the transfer had been made on Mr. Bentinck's behalf, but said that the directors had decided not to accept any more transfers, until they had taken the opinion of counsel, but he did not state on what point." The solicitor never received any further communication from the society with respect to the transfers.

On the 10th June 1871, the successful petition to wind-up the society was presented, and subsequently Mr. Bentinck received the following letter:—

26th June 1871.

Dear Sir,—Your transfer not having been passed, I beg to return you 6*s.* per P.O.O. sent for stamp and fee. No transfer can possibly be passed, until after the petition before the Vice-Chancellor has been dismissed, and the extraordinary general meeting called for the 7th proxo. has been held.—Yours faithfully,

D. EASUM, Secretary.

A call of 5*s.* per share had been made on the 545 shares on the 20th May 1871, but had never been paid. On the 26th Aug. 1871, an action was commenced against Mr. Bentinck, in the Common Pleas, to recover the sum of 138*l.* 1*s.*, in respect of the call.

On the 13th Nov. 1871, a notice was served on the society and on Mr. Hardman, of a motion to rectify the register of the society by the substitution of Mr. Hardman's name for Mr. Bentinck's. The motion was heard on the 4th Dec. 1871, and was ordered to stand over, until the winding-up petitions, that were pending, should be disposed of.

On the 12th Jan. 1872, the order to wind-up the society was made. In the winding-up, the official liquidators placed Mr. Bentinck's name on the list of contributories.

Mr. Bentinck now contended that he was entitled to have his name removed from the list. Notice of the application had been served on Mr. Hardman, but he did not appear.

H. M. Jackson, Q.C., for Mr. Bentinck.—On the 14th April the society received a notice of the wish to transfer the 500 shares. They did not express any disapproval of the proposed transferee within fourteen days. Accordingly under the 96th clause of the deed of settlement, Mr. Bentinck had a right to infer that the proposed transferee was approved of (*Lloyd's case, sup.* p. 25.) He then had a right to transfer; and but for the default of the society, the transfer would have been registered, and Mr. Hardman's name would now have been on the register. The same arguments apply to the forty-five shares.

Montague Cookson, for the official liquidators.—There was no justification for inferring the approval of the proposed transferee by the directors. It is not as if the directors had remained silent throughout the fourteen days after the notice. Within that period they intimated that they were making investigations into the position of the proposed transferee. It was, at this time, the interest

of the society to keep the register as it then stood. [Lord WESTBURY.—You cannot found yourself on any such thing, because, for aught I know, Mr. Hardman is as good as Mr. Bentinck.] I infer that he is not, only from the fact that the one gentleman is anxious to get off the list, and the other does not appear. [Lord WESTBURY.—You are not warranted in inferring that a man is not solvent because he does that. You might have shown that this transaction was intended to bring an insolvent man into the place of a solvent one; but you have done no such thing.] Supposing the proposed transferee has been approved of, he is to execute, at the office of the society, a deed according to the form prescribed by the directors. This was not done; and the transfers were not in accordance with the form prescribed by the directors, and they were executed before the alleged approval of the proposed transferee. Thus the measure of Mr. Bentinck's right is exactly that which would be given in a decree for specific performance. The contract cannct be performed specifically and the register amended: because the provisions in the deed of settlement cannot be followed. What should be done, therefore, is to leave Mr. Bentinck's name on the register, and to declare that Mr. Hardman is bound to indemnify him. With regard to the call, this was made on the 20th May 1871, and while it remained unpaid, no effective transfer could be executed.

Lord WESTBURY.—

In this case there is some question with regard to the true meaning and effect of the 96th clause of the European Society's deed of settlement (*sup.* p. 11). The other question is, whether anything was done by Mr. Bentinck, which at all postponed, or deprived him of, the right to insist upon the benefit that he gets by the expiration of the fourteen days. Now there can be no doubt that the clause is very badly worded; but I see enough in it to lead me to arrive with satisfaction at a certain conclusion. With regard to the first alternative, I adhere to what I said in *Lloyd's case* (*sup.* p. 25), namely, that besides the two things here expressed, there was another thing necessarily implied, that the directors might, at any time during the fourteen days, have intimated their refusal, their unwillingness to accept the person proposed by the shareholder as his transferee. Now it appears that they did nothing of the kind. It appears that they received a notice, which was not quite in conformity with their set rules. And it appears that they sent down another form of transfer-notice expressed in the manner which they had been in the habit of using. That transfer-notice, so sent down by them, was formally filled up by Mr. Bentinck, and it was sent up to the company, and received by them on the 14th April 1871. Now I have to inquire, whether between the 14th April and the 28th April anything was done or said between the parties, which would have the effect of depriving Mr. Bentinck of the right to insist, that at the end of the fourteen days the satisfaction and approval of the directors must be presumed. Now I find nothing of the kind that amounts to that. At first I was disposed to think that the language of the telegram of the 22nd April might amount to this—that the notice would be attended to on Tuesday next, and that that was acquiesced in by Mr Bentinck. But if I should come to that conclusion, it amounts to nothing, because it turns out upon inquiry that Tuesday was the 25th; the 25th, therefore, was well within the fourteen days. I find, therefore, nothing whatever suggested that should deprive Mr. Bentinck of the right to say:—"Fourteen days are gone, and you must be taken to have approved of my nominee." If that be the true interpretation of the deed, there is nothing here to deprive Mr Bentinck of the benefit of it. This clause in the deed of settlement is intended to facilitate the transfer of shares by shareholders, but at the same time to preserve to the company a check on the transferees proposed, and an opportunity of inquiring into their solvency and their responsibility. Accordingly, the deed gives first to the directors the power of at once rejecting or approving. Then it goes on to give them a limited term of fourteen days. But as, if they had an unlimited term, they might completely stop all transfers by shareholders, it deals with them in this way—if you are silent during fourteen days, we shall have a right to infer at the end of that time, that the nominee is approved of. And that condition of things runs throughout the whole of these two clauses. In the 97th it is again and again referred to:—"Approved of" or "considered as approved of;" and it is clear to my mind, therefore, that the deed means this—that the shareholder should have a right to say:—"My nominee ought to be considered as approved of, if you have allowed fourteen days to pass without intimating that he was approved of, or without requiring me to agree to a longer period of time for the purpose of making the investigation." Now I beg that it may be observed, what is the condition of things, resulting from that view of the case, at the expiration of the fourteen days. Mr. Bentinck had executed to Mr. Hardman a form of transfer. I attribute no weight to that instrument as a transfer, nor could the society have been required to accept it as such. But the instrument is evidence of a contract for valuable consideration between Mr. Bentinck and Mr. Hardman. And therefore I find that at the expiration of the fourteen days Mr. Bentinck, who had sold subject to the necessity of getting the approbation of the company, had got that approbation, and therefore the contract between Mr. Bentinck and Mr. Hardman was free from all difficulty and all impediment, and remained only to be carried legally into operation.

Now Mr. Cookson this morning has dwelt very much upon the necessity of that contract being carried into execution, *modo et formâ*, as prescribed by the 96th clause; and I agree that that would be so, if there had not been interposed an impossibility of complying with those directory enactments, in consequence of the insolvency of the company, and of the petition to wind-up presented against the company on the 10th June 1871. In the interval of time, between the 28th of April and that time, there is abundant evidence that Mr. Bentinck was very desirous that the contract should be carried into effect. But he never was told, on his application at the office, or on his tender of the second transfer, that had been prepared after the regular notice had been given to the company, that they would require him to attend at the office, and there to execute a deed of transfer. I have al-

ready observed that, before that could be done, the company became utterly insolvent—legally insolvent. I may also advert to the communication made to Mr Bentinck by the company, antecedently to that time, in which they stated that no transactions could be carried into effect, and that was repeated on the 26th June—"No transfer can possibly be passed." There is no room, therefore, for the least imputation of delay against Mr. Bentinck, so as to deprive him of the right of having this contract legally perfected. It was the duty of the directors to recognise the contract, and to admit their willingness to carry the contract into effect *modo et formâ*, as prescribed in the 96th clause. They did not do so. There was no delay in Mr. Bentinck, and the time came, when it became utterly impossible to act on the particular directions contained in the 96th clause, because by the petition and by the order that followed on it, the whole of these requisitions have become impossible, and are in effect utterly swept away. The contract, therefore, remains for me to perform. The only mode in which it can be performed, which it is the clear right of Mr. Bentinck to require, and the clear duty of Mr. Hardman to submit to, is by my ordering the one person to be taken off the register, and the other to be put on; for in no other way, under the order to wind-up, can an effectual transfer be made; and in no way whatever can these directory regulations as to the mode and form of transfer, contained in the 96th and 97th clauses, now be complied with. If you are satisfied of the validity and binding force of the contract, the ownership of the shares passes from Mr. Bentinck to Mr. Hardman, by virtue of that contract. All the rest is mere regulation as to the mode in which the legal interest shall be transferred. If the company were not in its present state, it would be right to abide by those regulations. But now that the company is no more, that other powers have usurped the place of the directors, those regulations cannot be complied with; and the only thing that remains is for me to give substantial effect to the existing contract of sale, that has passed the property, by directing that the register shall be made in conformity with that contract. An opportunity was afforded to the official liquidator, if he could have used it to advantage, to show that there was something or other between Mr. Bentinck and Mr. Hardman, or something in the situation of Mr. Hardman, that would render it wrong on my part specifically to perform that contract. Nothing of the kind has been suggested. I am not at liberty to hold that Mr. Hardman is not as solvent a man as Mr. Bentinck. I see nothing to induce me to believe that the company will suffer by Mr. Hardman being substituted for Mr. Bentinck. If there be anything, it was the duty of the official liquidators to have found it out, and presented it to me as a reason why the contract should not be performed.

The only thing that is remaining for me to consider, is the form in which I shall direct this change of ownership to be made, that is, in which I shall direct the contract to be carried into effect. Now, before the company broke up, a call was made. At the time of the call, Mr. Bentinck's name was on the register. The call bound Mr. Bentinck, but did not bind Mr. Hardman. That call, no doubt, being made after the contract between Mr. Bentinck and Mr. Hardman, Mr. Bentinck will have the right, if he pays the call, to recover the money from Mr. Hardman; but the security of the company is Mr. Bentinck's name alone. With regard to the other calls, I take it that they attach upon the person who is the real owner of the shares, that is, Mr. Hardman. If Mr. Bentinck's name remains on the register by reason of his non-payment of the call, it will remain there for the purpose of enforcing against him the payment of the calls. But the real ownership of the shares remains in Mr. Hardman; and, therefore, the call subsequently made must be enforced against him, when he is put upon the register. These are the plain facts of the case, and the mode in which they must be dealt with consistently with the established rules of equity, and consistently with reason and justice. The directors no doubt were in default. I will have every solemnity treated as executed, which the directors might have done but for their default. Mr. Bentinck has a right to say, therefore—"These regulations about the transfer being executed at the office were matters that were rendered impossible by the default of the directors, and that default continued until the time when the order was made." Mr. Welsby, Mr. Bentinck's solicitor, in his affidavit states clearly and distinctly what took place at the office, and he says that when the second tender was made, Mr. Easum duly accepted the notice, certificates and money, and admitted that a sufficient tender of the transfer had been made on Mr. Bentinck's behalf; but he said that the directors had decided not to accept any more transfers until they had taken the opinion of counsel: he did not state upon what point they desired that opinion. Mr. Welsby never received any further communication from Mr. Easum or any other person. The directors, therefore, put themselves wholly out of any longer having the power to insist upon the transfer being made in that form; and so it continued until now it is impossible to make it; and I must make it in conformity with the power vested in me, and therefore I declare that this contract was a valid contract as between Mr. Bentinck and Mr. Hardman; and I declare that a sufficient notice of the contract was given to the company, in conformity with the regulations of the deed of settlement and the practice of the company; and I declare that, inasmuch as the company allowed fourteen days to elapse from the receipt of that notice without making any objection, Mr. Hardman is to be taken as having been accepted and approved of by the company, and that the contract thenceforth ought to have been carried into effect; and I declare that its not being carried into effect in the manner pointed out by the directions contained in the 96th clause, was due to the default and refusal of the directors; and that, inasmuch as those directions cannot now be observed, the only mode of giving effect to the contract is by substituting Mr Hardman's name for Mr. Bentinck's upon the register. But I direct that that shall be done only upon payment of the call that was made on the 20th May, within three weeks from the time of the order, but without interest. The joint official liquidator must pay the costs of the action-at-law, as well as the costs of to-day, and of the proceedings in Chancery.

Solicitors for Mr. Bentinck, *Duncan* and *Merton*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

Jan. 22*nd*, and *Feb.* 6*th*.

THOMAS BROWN'S CASE.

Company — Winding-up — Contributory — Incomplete transfer of shares—A person, whose name it is proposed to substitute on the list of contributories in place of another's, must be before the court.

Where an application is made to have A.'s name taken off a list of contributories, on the ground that he was not the owner of the shares at the time when he was put upon the list, but had bonâ fide transferred them to B., and that B. was his representative, then those facts must be proved, unless they are admitted, and they can be proved only by having B. in court to have the facts established.

THIS was a question as to an incomplete transfer of shares.

The deed of settlement of the European Assurance Society provided, in clauses 96 and 97, that any shareholder might give notice in writing to the directors of his wish to transfer his shares, and request them to certify their approval or disapproval of the person to whom he proposed to transfer the shares. In the notice he was to describe the full name, and the profession or calling, and the place of abode of the proposed shareholder. And if such person should be approved of, or if the directors should not within fourteen days propose some other person to take the shares, proposed to be transferred, at the then market price (in which case the person so proposed should be considered as approved of by them), then the shareholder might, according to a form to be sanctioned by the directors, transfer the shares to his own proposed transferee, who thereupon might, on executing at the office of the company, or at some other prescribed place, the deed of settlement or a covenant to abide by the provisions of the deed, be entitled to call upon the directors to place his name on the register of shareholders, as the proprietor of such shares. And no share was to be transferred to any person who had not been first approved of, or considered as approved of, by the directors; and if any transfer should be made, or attempted to be made, to any person who had not been so first approved of, such transfer was to be void (*vide* clauses 96 and 97, *sup.* p. 11).

In the beginning of March 1871 Mr. Brown, who held ten shares in the society, entered into a written contract with Mr. Dunn, of 20, Hill-town, Dundee, iron worker, for the transfer of the shares to him. On the 16th March 1871, a transfer of the shares to Mr. Dunn was executed by Mr. Brown in common form, and was sent to the society by Mr. Haggart, Mr. Brown's solicitor; and, thereupon, the following correspondence ensued:—

16th March 1871.

Dear Sir,—I send you herewith transfer by Mr. T. Brown, Dundee, in favour of Mr. Bernard Dunn, of ten shares, numbered from 185,991 to 186,000 of the European Assurance Society's stock, presently standing in Mr. Brown's name, and I will thank you to register the transfer, and send the certificate in favour of Mr. Dunn of the shares, which now belong to him.

G. HAGGART.

The Secretary,
European Assurance Society.

17th March 1871.

Dear Sir,—I have your favour of yesterday, and beg to return you transfer Brown to Dunn as the same is informal, the company only allowing transfers on its own special form, and which have been previously approved by the directors. I enclose you a form of notice of transfer, and if you will fill up the same and return it with share certificate and stamp and fee, it shall have attention. D. EASUM, Secretary.

G. Haggart, Esq.

20th March, 1871.

Dear Sir,—I duly received your favour of 17th instant, and now send you herewith notice of transfer by Mr. T. Brown of his ten shares of the European Stock to Mr. B. Dunn, and will thank you to send me the formal transfer for signature of the seller. . . . .

D. Easum, Esq. G. HAGGART.

31st March 1871.

Dear Sir,—I sent you, on 20th inst., duly signed by Mr. Thomas Brown, certificate of transfer by him to Mr. Dunn of ten shares European Stock sold by my client. I expected you would ere this have sent me the official assignation for signature by the seller, but it has not yet reached. Mr. Dunn is anxious to get his title; and on his behalf I beg to intimate that he is to insist on his name being entered in the list of shareholders in respect of his purchase. I hope you will send any form of transfer you wish to me by Monday first, so that I may get it signed; but failing your doing so, the purchaser will hold by the legal transfer already executed by the seller, whether it is recognised by you or not.

D. Easum, Esq. G. HAGGART.

1st April 1871.

Dear Sir,—In reply to your favour of yesterday, I beg to inform you that a transfer committee will be held on Tuesday next, when Mr. Brown's application shall be duly considered. D. EASUM, Secretary.

G. Haggart, Esq.

This Tuesday was the 4th April, but the committee did not meet on that day, and it was arranged that the next meeting should be on the 18th April, 1871. Mr. Haggart, not having received any further communication with respect to the shares, again wrote:—

12th April 1871.

Dear Sir,—I was duly favoured with your letter of the 1st instant, stating that a transfer committee was to meet on the following Tuesday, viz., on the 4th inst., when Mr. Brown's application would be duly considered. I have since been waiting to hear from you further in the matter, but as yet I have no information. I will thank you to inform me at once what was done with the application, and whether you are to send me a formal assignation for signature. At the same time I must inform you that the purchaser of the shares holds the transfer I formerly sent you, and means to insist on it being a legal transfer to him. G. HAGGART.

D. Easum, Esq.

18th April 1871.

Dear Sir,—Your letter of the 12th instant is to hand. The share committee, which was called for to-day, did not sit. I am, therefore, unable at present to forward you form of transfer, as you request.

G. Haggart, Esq. D. EASUM, Secretary.

On the 5th May 1871 a circular notice of a call of 5*s*. per share was sent to Mr. Brown; and on the 9th May 1871 Mr. Haggart wrote to the secretary, insisting that Mr. Brown was no longer a shareholder of the society, and was accordingly not liable to pay calls. The secretary wrote in reply:—

12th May 1871.

Dear Sir,—In reply to your letter of yesterday, I beg to say that Mr. Brown's transfer has not been authorised by the directors. Until this has been done, and the call paid, it cannot be received. I received your transfer and call notice. D. EASUM, Secretary.

G. Haggart, Esq.

On the 10th June 1871, the petition to wind-up the society was presented, on which the winding-up order was made on the 12th Jan. 1872. In consequence of the proceedings in this petition, the secretary wrote:—

20th June 1871.

Dear Sir.—Your transfer not having been passed, I beg to return the 1*s.* 6*d.* sent for stamp and fee. No transfer now can be made until after the petition before the Vice-Chancellor has been dismissed, and the extraordinary general meeting called for the 7th prox. has been held. D. EASUM, Secretary.

T. Brown, Esq.

In the winding-up Mr. Brown's name was still on the register, and the official liquidator had accordingly placed him on the list of contributories.

Mr. Brown now applied to have his name removed from the list and Mr. Dunn's substituted in its place. No notice of the applicatiou had been served on Mr. Dunn, who, it appeared had gone to America.

Maclachlan appeared for Mr. Brown.

Lord WESTBURY.—I cannot take you off, unless I have the power of putting Mr. Dunn on, and for that purpose he must be brought before me. You say you did transfer to Mr. Dunn, and you say to the company—"You ought to have taken his name and put it on." In all these cases, where the application is that the registered shareholder requires to have another person's name substituted in lieu of his own, you must begin by making out the title of the contributory to have that person's name substituted. Here it is said that you did contract to sell to Mr. Dunn, and that you made a transfer to him. I must have that substantiated, and it must be for that purpose proved in his presence, and therefore you must bring him here, in order to have that done.

Maclachlan.—On that point I would refer to *Re the Joint Stock Discount Company, Fyfe's case* (L. Rep. 4 Ch. 768).

Lord WESTBURY.—The person with whom Dr. Fyfe, in that case, contracted, is shown to have been dead, and shown to have been insolvent, and there is no representative of his estate. It would be an idle thing to contend that you must wait until you have a representative of an insolvent estate, to put that representative on the register in lieu of Dr. Fyfe but here we have a living man, and, according to your statement, a solvent man at the time of this contract, and that man may be reached. It is quite plain, if you regard it upon principle for a moment, and not get bothered by the variety of authorities, it is this: if I apply to have my name taken off the list of contributories, on the ground that I was not the owner of the shares at the time when I was put upon the list, but had *bonâ fide* transferred them to somebody else, and that that other person was my representative, then I must prove these facts, unless they are admitted, and I can prove them only by having that other person in court to have the fact established. That is precisely your case here. It would be very different, if there was an application to the company to take the name off on this ground—that everything had been completed between you and another person, and that your name had not been taken off by the company by reason of their not performing some formal matter, which it was requisite for them to do, in order to give final completiou to your contract. There being no question as to the validity of the contract, then you might make your applicatiou against the company alone. Here the application is founded upon a contract which, as far as I know, has never been duly carried into effect, which the company altogether dispute, and which you cannot proceed to establish, unless you have the person, with whom you have contracted, present as a party to the suit. If you think you can comply with that exigency, I will give you time to try and do so.

Maclachlan.—The transferor and the transferee have both executed a transfer good in Scotch law: this transfer was forwarded by Mr. Dunn's solicitor to the company, and is now in the hands of the official liquidator.

Lord WESTBURY.—There is no difference between Scotch law and English law upon this point: in both it is necessary to see that any transfer alleged to have been made has been made *modo et formâ*, as prescribed by the deed of settlement. The notice of transfer, that was sent, would have to be submitted to the directors before you would receive the form of transfer. Then you see it is an executory contract, and I cannot deal with it, unless you bring both parties to it here. A contract completed, save for the formality which it was the duty of the directors to do, and which you requested them to do, and which they neglected, might have to be decided between the company and you; but an executory contract, left altogether incomplete, I cannot deal with, unless I have both parties to that contract before me.

Maclachlan.—I would ask that the case may stand over, in order that Dunn may be brought before the court.

Lord WESTBURY.—I warn you that it will be at the peril of costs. You have this difficulty in your way, that you have not even the foundation-stone, because the first thing requisite for the transfer would be to show that your application for leave to transfer, and your nominee, were approved of by the directors. All that is wanting. I point it out to your attention, in order to tell you that, if it is substantiated that there was no approbation by the directors, it would be a fatal allegation; and if you answer me by a delusive argument that that was the fault of the directors and that they are to blame, my answer is, that you must pursue your remedy against the directors personally who were in this alleged default; but you cannot have a transfer in favour of another individual substantiated, so as to put that other individual in your shoes upon the register of the company.

Maclachlan.—After the lapse of a fortnight we were entitled to infer the approbatiou of the directors.

Lord WESTBURY.—If there be a fortnight's silence, you may infer approbation; but here there was not a fortnight's silence, because you were told that a transfer committee had been appointed, and that your application would be brought before that committee: that is not silence. Finally, you were told that there would be no approbation. I will let the case stand over for a week, to give you an opportunity of writing to your Scotch solicitor. If your client determines to go on, you shall have, of course, a longer period of time to find out and serve Dunn. If, however, after considering the case, your client intimates to the official liquidator that he thinks it a desperate matter to pursue, and does not go on, then I must make him pay the costs.

Feb. 6th.—Mr. Brown now declined to serve Mr. Dunn with notice to appear; and the application was accordingly dismissed with costs.

Solicitor for Mr. Brown, *T. P. Henderson.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Monday, Feb. 3.

JOHN MURGATROYD'S CASE.

Company — Winding-up — Contributory — Married woman—Married Women's Property Act 1870—*Husband and wife placed on list of contributories conjointly, in respect of shares held by her when unmarried.*

Shares were registered in the name of an unmarried woman; she married in 1866, *but the fact of her marriage was not brought to the knowledge of the company. In* 1872 *the company was ordered to be wound-up, and her name, being on the register, was placed on the list of contributories. On an application being made to place the husband's name also on the list in respect of the shares, the question was raised whether his name should be placed there in right of his wife, or whether the husband and wife should be placed there conjointly.*

Held, that the husband and wife must be placed on the list of contributories conjointly.

Sadler's case (3 De G. & S. 36) *approved of.*

IN 1863 and 1864 Ellen Elizabeth Littler purchased 800 shares in the European Assurance Society, and was registered as the proprietor of them. In May 1866 she married John Murgatroyd. The society, however, never knew anything about the marriage until after the winding-up order, which was made in Jan. 1872. In the winding-up her name was placed on the list of contributories.

An application was now made by the official liquidators to place the husband's name also upon the list in respect of the shares; and the question arose whether the husband should be put on the list in right of his wife, or whether the husband and wife should be placed on the list jointly.

Montague Cookson for the official liquidators.—The case is analogous to that of a woman entering into a bond before marriage and then marrying. If an action at law is brought upon the bond, the husband and wife are joint defendants, and the liability of the wife survives, if the husband dies pending the action. In a case before Knight Bruce, V.C. (*Sadler's case, re The North of England Joint Stock Banking Company,* 3 D. G. & S. 36), it was considered that the husband and wife ought to be placed on the list jointly. So also in

Burlinson's case, re North of England Joint Stock Banking Company, 3 D. G. & S. 18;
White's case, re Vale of Neath and South Wales Brewery Company, 3 D. G. & S. 157;
Kluht's case, re Vale of Neath Brewery Company, 3 D. G. & S. 210.

[LORD WESTBURY. — Supposing the wife dies before the husband, what would be the consequence?]

Montague Cookson.—Then the whole liability survives to the husband.

[LORD WESTBURY.—Suppose the wife dies possessed of a large separate estate?]

Montague Cookson.—If they were jointly on the list, I do not know that that would prevent the official liquidator from asserting his equity against that estate. The names on the list of contributories appearing together would not create anything corresponding to a joint tenancy at law.

[LORD WESTBURY.—The ordinary course is that which Vice-Chancellor Knight Bruce followed in *Sadler's case* (*ubi sup.*); but if I followed that case, I might, having regard to the recent alteration of the law with respect to the separate estates of married women, be depriving the company of a good deal of their remedy.]

Montague Cookson.—The Married Women's Property Act 1870, would affect any property coming to Mrs. Murgatroyd after the passing of the Act, and no doubt she might acquire a separate estate in such property. If she were on the list as a married woman, it might still be a question whether after her death she would escape all liability, so as to leave her husband solely responsible.

LORD WESTBURY.—

I do not know how we can meet the difficulty. Possibly her separate estate might be held liable in addition to the other liabilities. At present I think it is quite clear that the entry upon the register should correspond with the liability upon an action at law. The action at law would lie against the husband and wife. I think, therefore, that the husband and wife conjointly must be put upon the list of contributories.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Thursday, Feb. 6.

SCARISBRICK'S CASE.

Company — Winding-up — Contributory — Married woman.

Where a married woman had purchased shares without the approval, consent, or knowledge of her husband, in the winding-up of the company an application by her to remove her name from the list of contributories—to which her husband was no party—was refused.

THIS was an application by Mrs. Scarisbrick, a married woman, to have her name removed from the list of contributories to the European Assurance Society.

Mrs. Scarisbrick was married on the 2nd May 1853, and the shares were taken by her during her coverture — the husband, who did not otherwise appear, now stated by affidavit:—She "took the shares in the European Assurance Society now standing in her name without my approval, consent, or knowledge, and I have always declined to have anything to do with such shares."

An action had been brought against her in 1870 by the society, to recover calls that had been made on the shares. She had pleaded her coverture, and the action had been dropped. In the winding-up of the society in 1872, the official liquidators placed her name on the list of contributories, and she now applied to have her name removed on the ground that she was a married woman.

A. G. Marten for Mrs. Scarisbrick.

Montague Cookson for the official liquidators.

LORD WESTBURY.—

He takes his wife for better, for worse; and although she acts without his approval, as he would take the property, so he must take the liability. If we do not have her on because she is a married woman, in any case we must have him on, as representing the liability of the married

woman. I must refuse the application, but I will refuse it without costs.

Solicitors for Mrs. Scarisbrick, *Milner, Riddle,* and *Mellor.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

MINSHALL'S CASE.

(*Vide sup. p.* 29.)

Jan. 22.—This case stood over from the 31st Oct. 1872, for the purpose of serving Mr. Fildes and Mr. William Minshall, the alleged transferees, with notice of the application. They had now been served with notice, but they did not appear.

Lord WESTBURY said that the application being to remove Mr. Robert Minshall's name from the list of contributories, and to substitute Mr. Fildes's name in its place, the first step was to prove the contract with Mr. Fildes. This not having been done, the application was again allowed to stand over for the purpose of amending the "case," in order to make and prove such a case as would entitle Mr. Robert Minshall to be discharged from being a contributory. Lord Westbury, however, added that "it might be very useful to the applicant to see whether the contradictions in the case were not such that, if he were to begin by alleging a contract with Mr. Fildes, the rest of the case would contradict the allegation of the existence of any such contract."

Feb. 6.—Nothing further was done on the part of Mr. Robert Minshall, and the application was accordingly now dismissed with costs.

Thursday, Feb. 6.

LADY ROLT'S CASE.

Company—Winding-up—Contributory—Executor—Specialty debt—Distribution of assets.

Executrix not liable to contribute on testator's shares in respect of assets formerly paid by her in discharge of a specialty debt.

A certain sum of Consols (about 11,000*l.) was held by trustees upon trust for Lady R.; subject to the restriction that during her life the income was to be paid to her separate use without power of anticipation, the sum was to be disposable of by her, notwithstanding any coverture. In* 1839 *the trustees transferred the Consols into her husband, Sir J. R.'s name, and Sir J. R. covenanted to re-transfer them on a certain day, and in the meantime to pay the trustees the dividends thereon. In* 1849 *Lady R. assigned to the trustees her reversion in the Consols expectant on her own death, as a further security for the re-transfer of the Consols. The Consols were never retransferred, or the covenant satisfied in any other way. In* 1856 *Sir J. R. died, leaving Lady R. his sole executrix and universal legatee. At his death he held fifty shares in a company, but his whole estate did not amount to* 1500*l. Lady R., the executrix, paid his funeral and testamentary expenses, and retained the residue in satisfaction of his covenant. In the winding-up of the company in* 1872 *she was placed on the list of contributories, in respect of the fifty shares, and the official liquidators contended that she was liable to the society in respect of the amount of her husband's estate retained by her.*

Held, that the money must be considered as having been paid by Lady R. to the trustees, and then handed over by them to her as the cestui-que trust. Thus the whole of the assets had been applied in the payment of a presently payable specialty debt. Although she was aware of the testator having entered into engagements upon which a liability might thereafter be established against his estate, she would have a right to set up that payment against any other liability not being of a higher nature. Accordingly, Lady R.'s name was retained on the list of contributories, with a declaration that "in respect of the assets hitherto received by her she is not liable."

THIS was a question as to whether Lady Rolt's name should remain on the list of contributories to the Royal Naval, &c., Assurance Society.

Under the will of Mrs. Caswall, who died in 1829, certain trustees were possessed of 10,000*l.* Three Per Cent. Consols, and 1312*l.* 10*s.* New Four Per Cent. Annuities, upon trust for her daughter Lady Rolt, then Anne Caswall, subject to the restriction that during Lady Rolt's life, the income thereof was to be paid to her to her separate use, without power of anticipation. Subject to this trust, the funds were to be considered as her absolute property, and might, notwithstanding any coverture, be disposed of by her.

By deeds dated the 18th and 19th Nov. 1839, in consideration of the transfer of these sums of 10,000*l.* Three per Cent. Consols and 1312*l.* 10*s.* New Three and a Half per Cent. Annuities into the name of her husband, Colonel Sir John Rolt, from the names of the trustees of the will, Messrs. R. and M. S. Parnther, Sir John Rolt and Lady Rolt granted certain estates to Messrs. Parnther, subject to a proviso for redemption of the same on the retransfer of these annuities; and Sir John Rolt further covenanted with Messrs. R. and M. S. Parnther that he would transfer into their names these two sums of 10,000*l.* Three per Cent. Consols and 1312*l.* 10*s.* New Three and a Half per Cent. Annuities on the day therein appointed, and in the meantime would pay the dividends thereon.

By a deed, dated the 27th July 1849, Lady Rolt assigned to the trustees, Messrs. R. and M. S. Parnther, all her remainder or reversion in these 10,000*l.* Three per Cent. Consols, and 1312*l.* 10*s.* New Three and a Half per Cent. Annuities, expectant on the determination of her own life interest therein, as a further security for the retransfer of the annuities. The deed gave the trustees a power of sale in case of default being made in the retransfer.

Sir John Rolt died on the 8th Nov. 1856, having by his will appointed Lady Rolt his sole executrix and universal legatee. At the time of his death he held fifty shares in the Royal Naval Society; but his whole personal property did not amount in value to 1500*l.*, and he had no real estate.

During his life he never retransferred or paid, or satisfied the sums of 10,000*l.* Three Per Cent. Consols, and 1312*l* 10*s.* New Three and a Half per Cent. Annuities; and the other security that had been given to the trustees had been subjected to subsequent mortgages, and had been lost. Lady Rolt, the executrix, accordingly paid the funeral and testamentary expenses, and retained the residue of his personal estate to satisfy his covenant with the trustees.

In the winding-up of the society in 1872, the official liquidators placed her name upon the list of contributories.

She, however. now contended that she had no assets in hand to meet the liability, the estate having been fully administered, and the whole duly applied in payment of specialty debts.

The official liquidators, on the other hand, contended that it was not competent to her to treat the liability of her husband, under his covenant of the 19th Nov. 1839, as a specialty debt, having priority over the debt due from his estate to the society in respect of future calls, and that her retention of the residue of his estate, in satisfaction of the covenant, did not exonerate her from being accountable to the society in respect of the amount so retained.

Montague Cookson, for the official liquidators.—At the time when she retained her husband's estate to satisfy the covenant, the trustees, who were the legal holders of the security, might have at once realised the reversion of the annuities, and have thereby satisfied the covenant. [Lord WESTBURY.—That is a question between you and the trustees. But is not Lady Rolt clearly entitled to the benefit of the covenant made by her husband with the trustees, and has not she a right to say that that, which she has retained, has been retained by her with the benefit of the legal right of those trustees, and has been applied by her in payment of her separate estate?] A distinction has been drawn between a case where the covenant is with the trustees to pay to the trustees and a case where the covenant is with trustees to pay to the *cestui que trust*. If Lady Rolt were the direct and immediate beneficiary under the covenant, it might be said that she could claim as a specialty creditor under the covenant, although it was not entered into specifically with her. [Lord WESTBURY.—The covenant is with her trustee, and the legal right, which the covenantee has, she is entitled to the benefit of.] The question will be, whether she is in all respects in as good a situation as the trustees themselves. They were unquestionably specialty creditors. But she was only a beneficiary as regards them. The doctrine of retainer extends only to legal assets, and is not applicable to equitable assets. [LORD WESTBURY.—In the mode, in which I have last adverted to it, there is nothing about retainer; she being *cestui que trust*—the parties holding a legal right of action by covenant—has a right to invoke that, and set up their title as against any persons claiming adversely to her.] That would depend on whether she is entitled voluntarily to do that which they ought to have done, viz., to insist on the satisfaction of the covenant; and then say she was in as good a position as the covenantees. If so, she is a specialty creditor, and may be favoured by herself, the executrix. There is, however, an additional circumstance here that the covenantees had another security which they might have realised. [Lord WESTBURY.—You may come to put her to her election. You do not make a call; your right does not arise till the call is made. Before that call has been made, the whole of the property of the testator has been exhausted. Has it been exhausted in a manner which is good as against your subsequent legal right? Yes, it has; because the right of the covenantee under Sir John Rolt's covenant has absorbed the whole of the property of Sir John Rolt. Then, you come and say, "Nay, but there was another fund, that might have satisfied the debt that has been satisfied by that application." Then, you must endeavour, if you can, to make good that other.] With regard to there being no debt till a call is made, where a testator has shares in a joint-stock bank, and his executor distributes the assets regardless of future calls, he does a perilous thing. [Lord WESTBURY.—Certainly; but if he pays creditors entitled to claim before the call is made, his position is good.] Then, it is simply a case in which creditors who have a *de præsenti* debt, are paid, and a creditor, who has an *in futuro* debt, is not paid. [Lord WESTBURY.—Or who is not a creditor of any definite sum. Here is a liability which has not ripened into a sum of money made presently payable. It cannot stand in competition with the debts under the covenant . . . . Lady Rolt had a right to make these present payments, and she had a right to put every payment, that she made in respect of that covenant, under the cloak of the legal title of the covenantee, even if the covenantee did not insist upon it.]

H. M. Jackson, Q.C. and *Methold*, for Lady Rolt, were not called upon.

Lord WESTBURY.—

I will not put Lady Rolt upon the list for the the purpose of compelling her to resort to the species of defence which is now before me, and upon the merits of which I have to decide. The case is as simple as possible. You come here in respect of a call made on Sir John Rolt's shares; and he having been dead sixteen years, this call was made the other day, that is, made since the month of July 1872, and you go to Lady Rolt and say, "You have the assets of your husband." Lady Rolt says, "No, you are mistaken; I have no assets of my husband." Then you say, "Well, but did not your husband leave property, and have you not had possession of the property?" Lady Rolt says, "Yes, I had a small property, and I applied every shilling of it for the purpose of practically satisfying the covenant, which my husband entered into with certain trustees, who are trustees for me, to repay them a large sum of money, and every payment that I have made is covered by that covenant; and I invoke the legal right and title of the covenantees under that covenant to justify my payment. That legal right and title existed a long while ago, and still exists; and I am in the situation therefore of an executrix who has paid a presently payable specialty debt, and applied the whole of the assets in the discharge of that debt, although she has notice that her testator had entered into engagements, upon which a liability may hereafter be established against his estate." She took a present debt, presently enforceable, which ought to have been paid, and which she at law would be bound to pay, and she has applied the money in payment of that debt, and although the money has been applied in this manner, that nominally and legally it must be taken to have been received by the trustee the covenantee, yet it has been in the eye of the law, handed over to her again as being the *cestui que trust* of that trustee. That fact does not, in the slightest degree, weaken or impair her right to pay the trustee the covenantee, and to set up that payment against any other debt or liability not being of a higher nature than the covenant, which she has thus

practically satisfied. That is the whole of the case here, and therefore I must dismiss the application with costs, declaring that the whole of the estate of the late Sir John Rolt, received by his executrix, has been in law duly applied in payment of the specialty debt, arising under the covenant that was entered into by Sir John Rolt with those persons. A difficulty arises in this way: I do not very well know how to deal with it, except by making this declaration; I cannot take her off the list, because for aught I know, she may receive to-morrow some unknown acquired property, perhaps to the extent of 20,000*l.*, of Sir John Rolt's estate.

Jackson.—We know in point of fact, and there is no doubt, that Sir John Rolt did receive the greater part of his wife's money, and did die insolvent.

LORD WESTBURY. — What can you do in that state of the case? Here is an application made against an executrix in respect of assets received by her. The court finds that the assets so received have been duly and properly applied. Well, but it cannot take the executrix's name off the register, for the reasons I have given; but it can only continue her on the register, with a declara- that in respect of the assets hitherto received by her she is not liable.

Solicitors for Lady Rolt, *Wynne* and *Son.*

Solicitors for the official liquidators of the Royal Naval Society, *Mercer* and *Mercer.*

END OF THE SECOND SITTINGS.

THE

EUROPEAN ASSURANCE ARBITRATION.

(BEFORE LORD WESTBURY.)

THIRD SITTINGS.

REPORTED BY R. MARRACK, ESQ., BARRISTER-AT-LAW.

Feb. 5 and April 8.

SCOTT'S CASE; HORT'S CASE.

Life assurance company—Amalgamation of companies—Winding-up—Novation of contract—Indorsement on policy—Novation of the Civil Law—Policyholder held, after an amalgamation, to be a creditor, not of the new company, but of the old—Before proof on a policy is allowed, the unpaid premium is to be paid for the current year, and not merely the quarterly instalment up to the winding-up order.

S. held three participating policies granted by the R. Life Assurance Company in 1848, *on his own life. In* 1866 *he received circulars from his company, stating that they had made an arrangement with the E. Life Assurance Society for undertaking the obligations of the policies, and that the E. Society would in future be the substitute of the R. Company: and further, that "the terms and conditions of your policies remain, of course, unaltered by the arrangement, and although each policyholder is fully guaranteed for all claims under the present policies by the covenants of the E. Society in the deeds between the two companies carrying out the arrangement, any of the assured desiring it may, for greater security, either have an indorsement to that effect made on their policies, or may have a policy guaranteeing the existing policy, or a new policy of the E. Society." Annexed to one of these circulars was a circular from the E. Society, announcing the transfer of business, and offering a new policy or a guarantee policy, or an indorsement. S. accordingly sent in his policies to the E. Society, who placed upon them an indorsement:—"It is hereby declared that, subject to the proviso hereunder stated the funds and property of the E. Society . . . shall be liable for the due payment of the sum of* 1000*l. (with profits) assured by the within policy with the R. Company . . . . Provided always that the future premiums payable in respect of the said policy, be duly paid to the said E. Society at the times and in the manner set forth in the said policy."*

H. was a non-participating policyholder, and after receiving the amalgamation circulars, sent his policies to the E. Society, who placed on them a similar indorsement, except that the parenthesis contained the words "without profits" instead of the words "with profits."

Subsequently to the amalgamation the premiums were in either case paid to the E. Society and receipts accepted from them. No bonus was ever declared by the E. Society on any of the policies. It was now contended that the words "with profits" and "without profits" referred to the profits of the E. Society, and that, consequently, the indorsement conclusively showed a novation with that society:

Held that these words "with profits" and "without profits" were merely descriptive of the original policies granted by the R. Company, as participating and non-participating policies respectively; and that there was no novation, the indorsement being a contract in addition to, and not in substitution for, the original contract with the R. Company: thus S. and H. were entitled to claim on their policies against the R. Company, which originally granted them.

When a policyholder accepts from the new company an indorsement or other contract, which cannot be included within the limits of the original contract with the old company, but which is an addition to it, either of an advantage, or of a new mode of proceeding, then the contract so containing this enlargement is, in the absence of any express stipulation relating thereto, held to be in substitution for, and not in addition to, the original contract.

A policy containing some provisions with respect to the payment of the premiums in quarterly instalments, it was

Held that, before presenting the policy for valuation, the whole of the annual premium must be paid for the year current when the winding-up order was made, and not merely the quarterly instalments up to the date of the winding-up order.

Novation of the Civil Law referred to.

Scott's Case was a question of novation.

On the 23rd Dec., 1848, the Royal Naval, Military and East India Company Life Assurance Society granted to Major General G. Y. D. Scott, a participating policy on his own life for the sum of 1000*l.* Subsequently two other policies were granted to him.

In 1866 the Royal Naval &c. Society was dissolved in accordance with provisions of the deed of settlement, and its business was transferred to the European Assurance Society, which undertook to pay and satisfy its liabilities, debts and engagements. (*Vide sup.* pp. 47, 48.)

In Aug. and Sept., 1868, General Scott received the three circulars that were sent to the policyholders on the amalgamation, in one of which it was stated (*inter alia*) that "the terms and conditions of your policies remain, of course, unaltered by the arrangement; and although each policyholder is fully guaranteed for all claims under the present policies, by the covenants of the European

Society in the deeds between the two companies carrying out the arrangement, any of the assured desiring it may, for greater security, either have an indorsement to that effect made on their policies, or may have a policy guaranteeing the existing policy, or a new policy of the European Society." (See these circulars, in *Swift's Case*, *sup.* pp. 89, 90.)

Accordingly General Scott sent his policies to the office of the European Society; they were subsequently sent back to him, indorsed with the following:—

The European Assurance Society,
Chief Offices, 316, Regent Street, London.
Royal Naval and Military, No. 1649.

Memorandum.—It is hereby declared that, subject to the proviso hereunder stated, the funds and property of the European Assurance Society of London, as provided for in the deed of settlement of the said society, shall be liable for the due payment of the sum of 1000*l.* (with profits), assured by the within policy with the Royal Naval, Military and East India Company Life Assurance Society of London, to the person or persons legally entitled to receive the same.

Provided always that the future premiums payable in respect of the said policy, be duly paid to the said European Assurance Society, at the times and in the manner set forth in the said policy.

In witness whereof the common seal of the said society having been hereunto affixed, we, three of the directors and the manager of the said European Assurance Society, have hereunto set our hands this 14th day of March, 1867.

Printed receipts of renewal premiums issued from the chief office will alone be admitted as valid.

JOHN HEDGINS, F. C. HAYWARD, HENRY DEFFELL, } Directors of the European Assurance Society.
HENRY LAKE, Manager.

Seal of the European Assurance Society.

The premiums were subsequently paid by General Scott to the European Society, the following being the forms of the receipts for the years 1866-68:—

European Assurance Society.
Empowered by special Act of Parliament. With which is consolidated the busines of the Royal Naval, Military and East India Company Life Assurance Society.
Chief Office, 316, Regent Street, W., London.
(Royal Naval and Military Department),
17, Waterloo Place, Pall Mall, S.W.

Receipt, No. $\frac{N}{M}$ 8587.

Sum assured 1000*l.*

Policy of Royal Naval and Military Society. No. 1649.

Received this 27th day of December, 1866, the sum of 24*l.* 12*s.* 6*d.*, being the payment of twelve months' premium from 23rd December, 1866, for an assurance on the life of Colonel Henry Scott, effected by the before named policy, and as now adopted and guaranteed by the European Assurance Society, 24*l.* 12*s.* 6*d.*

JOHN HEDGINS, JAMES FENNELL, } Directors.

Countersigned
E. G. BEAUMONT, Agent or Cashier.

Printed receipts for renewal premiums issued from the chief office are alone admitted as valid.

The forms for 1869-71 were:—

Royal Naval, Military, and East India Life Department.
European Assurance Society.
Empowered by special Act of Parliament.
Chief office: No. 17, Waterloo Place, Pall Mall, London, S.W.

Premium £8 0s. 9d. on the life of Col. H. Y. D. Scott.

Received the 5th April 1869 the sum above-stated, being the amount of premium for the renewal of Policy No. 2744 for twelve months from the 11th March 1869 according to the tenour of the said policy.

ROBERT NORTON, MICHL. QUINN, } Directors.

(Countersigned) J. L. TEMPLETON.

Printed receipts for renewal premiums issued from the chief office, and signed by two directors, will alone be admitted as valid.

The renewal notice, sent from time to time by the European Society to Mr. Hort, was in the following form:—

European Assurance Society
(Empowered by special Act of Parliament),
With which is consolidated the business of the Royal Naval, Military, and East India Company Life Assurance Society.
Chief offices: 316, Regent Street, London, W.
Royal Naval and Military Department:
17, Waterloo Place, Pall Mall, S.W.

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Sir—I beg leave to acquaint you that the premium in the under-mentioned policy on the life of will become due on the , and that in order to continue policy in force, the said premium must be paid within thirty days from that date at the office of the Royal Naval and Military Department of the Society, 17, Waterloo Place, Pall Mall, London.

Printed official receipts issued from the chief office, and signed by two directors, are alone admitted as valid, and no other should on any account be accepted; policy-holders, who pay premiums without receiving official receipts in exchange, do so at their own risk, and on their own responsibility. HENRY LAKE,
Manager.

Policy No.— (Royal Naval, Military, and East India Company Life Assurance Society).
Sum assured—
Premium—

It is requested that all remittances be made on bank drafts (payable at sight), and for security crossed "& Co.," or by Post-office orders in favour of the manager; the expense can be deducted from the remittance.

N.B.—The premium cannot be received after the expiration of the days of grace, without the production of satisfactory evidence of health, and the usual fine. Office hours daily 10 to 4 o'clock; Saturdays, 10 to 2 o'clock.

Important.—It is particularly requested that notice of any alteration of address be at once forwarded direct to the chief office, London; the notice should draw attention to the change, and every notice letter, &c., whether containing a remittance, information, or inquiries, should state number of policy and name of assured.

No bonus was ever declared by the European Society in respect of these, or any other policies issued by the Royal Naval Society; the bonus, that was declared by the European Society subsequently to the amalgamation, being a bonus for a period of five years prior to the amalgamation.

Immediately after the amalgamation in 1866, the European Society removed their business to the offices of the Royal Naval Society; the name of the Royal Naval Society was retained on the wire blinds in the window, and the name of the European Society was affixed to the exterior of the building.

On the 12th Jan. and the 1st March 1872 respectively, orders were made to wind-up the European and the Royal Naval Societies. In the winding-up General Scott claimed to be entitled to prove on his policies against the Royal Naval Society. The official liquidators, on the other hand, contended that there had been a novation with the European Society, and that that society was alone liable on the policies.

Cracknall and *Henderson*, for General Scott, contended that the indorsement was in no way a release of the liability of the original company, the Royal Naval Society.

[Lord WESTBURY.—You see there are some very ugly words in the indorsement—"with profits." What are those profits? Supposing they are taken as designating only a participating policy, what are the profits? Would they not be the profits of the European Society?]

Cracknall.—The words "with profits" are descriptive of the original policy, which was a participating one; and they refer to the profits of the company that granted the policy, the Royal Naval Society. There is not a new contract in substitution for the old one. General Scott was told merely that his policy was now guaranteed by the European Society.

[LORD WESTBURY.—General Scott had a policy in the Royal Naval Society; under that policy he was entitled, or would have been entitled, to certain benefits. If the European Society guarantee what he is entitled to, the estimate of what he is entitled to, must of course then be made, as if there had been no union between the two companies, and he could have claimed such profits only to be appropriated to his policy as he would have had if the old company had continued its business. And if he had kept himself strictly within that, he would have had nothing more than an additional security for an existing contract, which would have made no change in that contract. There would have been nothing of what has been called novation, nor anything which may be called substitution. Whether the question could have been worked out, so as to have ascertained, after the business became one, what would have been the profits of the original company if there had been no amalgamation, it may be difficult to see, but that does not affect the question in the abstract. That would have been the state of a mere guarantee superadded to the original contract; but here I have a case, in which the proposition is, that the funds and property of the European Society shall be liable for the due payment of the sum of 1000*l.*, "with profits," which I take to amount to this—"You shall have the same benefit in our company and its profits, as if you had originally effected your policy with our company." That seems to be, does it not, the whole contract? . . . I cannot bring my mind to see that this indorsement is merely the expression of a guarantee. If you can make it out to be that, it will be a security for a contract already existing, to which the guarantee is superadded; but this is not to my mind the mere expression of what is denoted by the term "guarantee," but amounts to an original independent contract . . . You see if the indorsement had been limited only to this expression, that the policyholder should be entitled to sue the European Society, just as the Royal Naval Society would be entitled to sue them upon the general guarantee, the general guarantee given by the European Society to the Royal Naval Society, would be a contract, upon which no individual policyholder could sue. Suppose the indorsement then had run thus: "The Royal Naval Society having transferred their business to the European Society upon a contract that the European Society should indemnify them against all their debts and engagements, the European Society hereby declare that they are liable so to do, and that the policyholder (No. so and so) shall have a right, by virtue of this indorsement, to treat that engagement as having been made with him individually, as well as with the company"—that would have been a mere declaration that the covenant to indemnify should extend to him; and if it had been limited to that, I should have said that it would not have amounted to a substitution of a new contract, or of a new liability, in the place of the old. But here I have got an engagement beyond that, that the funds and property of the European Society, as provided by itself, should be liable for the due payment of the sum of 1000*l.* That may be an aggregation of rights in favour of the policyholder, beyond the simple right that he would be entitled to under the covenant to indemnify. It does not stop there—but it goes on to say that this shall be given to him "with profits." I do not think that these words properly mean with such profits as the holder of a policy originally effected with the Royal Naval Society would be entitled to. . . . Under a covenant to indemnify, there would be a right of action by the one company against the other, but that right of action is a different thing to the contract contained in the indorsement, and might lead to different results. I will not have a creditor fastened with a new contract, of which he knew nothing, and his assent to which is to be inferred only from equivocal circumstances; but if I find a creditor going in and accepting a document, which I cannot keep within the limits of the original contract, but which appears to be an addition to it, either in the sense of the addition of the new person liable, or of an advantage, or of a new mode of proceeding, then the contract, so containing this enlargement, is a substitution for the original contract that does not contain it. If you make out here that "profits" agree with the participle "assured," then the profits will be none other than the profits assured by the original policy. If so, there is no addition. . . . Another element in the new contract is the condition that the future premiums be paid to the European Society. This is a new condition. If I get an indorsement with a new condition, different from the condition in the original policy, is not the contract so far a new contract? The European Society say: "We will give you a direct resort against us and our property, provided you give us a direct resort against you for the payment of the premiums."]

Cracknall.—The person assured is under no obligation to continue to pay his premiums. From the language contained in the circulars announcing the amalgamation, it is clear that this payment of the premiums to the European Society was intended to be a payment to them, acting as the agents of the Royal Naval Society.

[Lord WESTBURY.—The preliminary circulars would not control the language of the contract contained in the indorsement; it speaks for itself. and the manner in which it presents itself to my mind is this—that after that indorsement given by the European Society, and accepted by General Scott, the relation between the European Society and General Scott was a very different *status* or relation from that which previously existed, and if there be a different relation, there is in effect a different contract; and if in a transaction of this kind the policyholder goes and accepts a different contract, and agrees to stand in a different relation, it is a case in which the latter contract is deliberately substituted for, and takes the place of, the first. Now insisting, as I mean to do, upon the rules, that I have already expressed myself willing to be bound by in cases of novation, I cannot possibly refuse to hold that it is a case of the substitution of the one contract for the other, when the second contract puts the parties in a different legal relation to each other to what they

stood in by virtue of the original contract. Under the covenant to indemnify the Royal Naval Society, a policyholder of it could not have interfered to prevent the European Society from dealing with its property, but under this indorsement the policyholders of the Royal Naval Society, being put in immediate privity of contract with the European Society, might have prevented it from doing many things which they could not prevent under the covenant of indemnity; therefore there was a new relation, involving larger rights on the one side, and new and more extended liabilities on the other. Now, the Roman law says of this, that both contracts shall be regarded as continuing unimpaired, the one by the other, unless it be expressly stipulated to the contrary. General Scott is offered an indorsement (see the circulars *sup.* 89, 90): he sends in his policy to receive that indorsement, and he receives it back with the indorsement. Now the first rule is:—

Tunc solum novationem fieri quotiens hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt: (Justinian's Institutes, Lib. iii., Tit. xxix., par. 3; see this paragraph, *sup.* p. 44.) *A novation of the first contract shall be effected only when this very thing shall have been expressed between the contracting parties, namely, that they had met together for the purpose of making a novation of the prior contract.*

General Scott sends in his policy for a new indorsement. The company make it and send it back. The thing to be done, and which they mutually agreed on, is the thing expressed in that indorsement. If that be different from the former contract, it proves that the parties had agreed on a new contract, that is, on novation; and if it be not different, then the civil law says:—

Alioquin manere et pristinam obligationem et secundam ei accedere (*sup.* p. 44). *Both the original contract remains, and the second contract becomes an adjunct or addition to it.*

Now follow it out. I must hold that the two parties intercommunicated—that would be the *conventio*—to have indorsed upon the policy that which is contained in this indorsement. Then the indorsement must speak for itself. If it be a new thing, that would be a *novatio*. It is quite clear they intended this new thing to be brought into being; and if the new thing be another and a different contract, then I am afraid I must hold it is a case of substitution for, and not of addition to the original contract. At present I am inclined to decide against you, Mr. Cracknall; but I will not express that opinion until I have considered the matter].

Napier Higgins, Q.C. and *Montague Cookson* appeared for the official liquidators of the Royal Naval Society.

Judgment was reserved (*vide infra* p. 114).

Tuesday, April 8.

HORT'S CASE.

THIS was a question of a similar kind to *Scott's* case. The facts were the same, except that here the policies were non-participating policies, and the indorsement placed on them contained in the parenthesis the words "without profits," instead of the words "with profits;" so that the indorsement ran thus:—

Memorandum.—It is hereby declared that, subject to the proviso, hereunder stated, the funds and property of the European Assurance Society of London, as provided for in the deed of settlement of the said society, shall be liable for the due payment of the sum of 200*l.* (without profits) assured by the within policy with the Royal Naval Military and East India Company Life Assurance Society of London to the person or persons legally entitled to receive the same.

Provided always that the future premiums payable in respect of the said policy be duly paid to the said European Assurance Society, at the times and in the manner set forth in the said policy.

There was also a further question as to the payment of premiums.

One of the policies contained a provision for payment of the premiums by quarterly instalments. It recited that the directors of the Royal Naval Society had undertaken the proposed assurance at a certain annual premium, which the directors had agreed to accept by instalments as thereinafter mentioned; but subject to the understanding that the whole premium for any year covered by the assurance should be considered as having become due on the commencement of the year, notwithstanding the agreement to accept such premium by instalments, and that the instalments thereof (if any), remaining unpaid at the termination of the assurance, should be retained out of the sum payable thereunder, or in case no money should be payable thereunder, should be receivable or recoverable for the benefit of the society from the assured or his representatives by the directors as a debt due to them. And the policy witnessed (*inter alia*) that if Mr. Hort should on the quarterly days therein mentioned, or on such and so many as should happen in the lifetime of Mr. Hort, pay to the directors the quarterly sums therein mentioned, and if he should die before the 10th Dec. then following, or if he should live beyond that date, and should on or before every 11th Dec., 11th March, 11 June, and 11th Sept. during the continuance of the assurance, pay to the directors a certain sum, being the quarterly instalment of the annual premium, and if, in the event of the death of Mr. Hort during the currency of any year ending on the 10th Dec., his executors, &c., should pay to the directors the amount that might remain unpaid for the premium for the year current at his death, then the capital, stock, and funds of the society were to be liable to pay to his executors, &c. the sum assured.

The premiums were paid by quarterly instalments, and the receipts given by the Royal Naval Society ran as follows:—

Received of the Rev. C. J. Hort the sum of 1*l.* 7*s.* 10*d.*, being the quarterly premium due to 11th Dec. 1865, for the assurance of 200*l.* on the life of the Rev. C. J. Hort, the particulars of which are expressed in a policy bearing the number and date above mentioned.

The receipts given by the European Society ran thus:—

Received this day of Dec. 1866 the sum of 1*l.* 7*s.* 10*d.* being the payment of three months' premium from 11th Dec. 1866, for an assurance on the life of the Rev. C. J. Hort effected by the before-named policy, and as now adopted and guaranteed by the European Assurance Society.

Received the 13th Dec. 1869 the sum above stated, being the amount of premium for the renewal of policy, No. 3657 for three months, from the 11th Dec. 1869 according to the tenor of the said policy.

The other policy contained similar provisions whereby the premiums were to be paid by half yearly instalments.

On the 1st March 1872 the Royal Naval Society was ordered to be wound-up. The then current year of one of the policies expired on the 11th Dec. 1872, and the last quarterly instalment of premium paid thereon was that which became

payable 11th Dec. 1871. The current year of the other policy expired on the 4th Feb. 1873; and the last half-yearly instalment of premiums paid thereon was that which became payable on the 5th Feb. 1872.

The official liquidators now contended that, before being admitted to prove against either of the societies in respect of his policies, Mr. Hort must pay the instalments of the premiums remaining unpaid thereon for the year current when the winding-up order was made, on the ground that, notwithstanding the agreement to accept the premium by instalments, the whole premium was, by the terms of the policies, to be considered as having become due at the commencement of the year; and, under *Wallberg's case* (*sup.* p. 50) any premium, that became due on a policy before the order to wind-up was made, was to be pa d before presenting the policy for valuatiou.

Ince appeared for Mr. Hort, and admitted that the premiums must be paid in full for the current year.

Napier Higgins, Q.C. and *Montague Cookson* appeared for the official liquidators of the Royal Naval Society, and contended that the indorsement on the policies created a substitution of the liability of the European Society in the place of that of the Royal Naval Society. They referred to two cases in the Albert Arbitration:

Hawtrey's case, 16 S. J. 713; Reilly's Albert Rep. 138;

Dale's case, 15 S. J. 886; Reilly's Albert Rep. 11.

[Lord Westbury.—The indorsement was by way of addition, but not by way of substitution. There is an engagement between the two companies. They want to make that engagement palatable to the policyholder. They say to him "You may have an indorsement that the European Society, receiving your policy, shall be liable to you in addition to the original contracting party, namely, the Royal Naval Society. This man sends in his policy. What did he send it to the European Society for? Not to be burnt, and to receive a new policy; but to have this indorsement, and it was returned to him with this indorsement. Is there any trace there that the European Society and Mr. Hort met on the footing of making a new contract that should supersede the old? This indorsement is perfectly consistent with the arrangement between the two companies, and perfectly consistent with the assurance given to the policyholder that, although he took this indorsement, the terms of his policy should remain unaltered. Now, just let me remind you, the difficulty that I felt in *Scott's* case was this—*Scott's* case had the words "*with profits*" instead of the words "*without profits*"; and at first, probably from want of apprehension on my part, I thought it was possible to contend that the words "*with profits*" meant with profits of the European Society, and under that misapprehension I said, if it admits of that interpretation, then it is a new interest and a new contract, added to the original contract, and making the man participator in the profits of the European Society, whereas he was only entitled to participate in the profits of the Royal Naval Society. But looking at this, I am satisfied that the words "*with profits*" have no more meaning than the words "*without profits*," and are nothing in the world more than a description of the policy.]

Napier Higgins — In this circular reference is made to the participating policyholders; and I understand, as a fact, that all the policyholders, who were taken over as bonus policyholders, did participate in the profits of the European Society.

[Lord Westbury.—I do not understand how that could be, nor is it stated as a matter of fact, but if it were a matter of fact, it was inconsistent with their relative rights and with the legal title.]

Lord Westbury.—

The indorsement is to be taken together with the offer that was made to the policyholder. The offer made to the policyholder is most distinct (*see* the circulars, *sup.* pp. 89, 90). First of all, he has this assurance given him:—"The terms and conditions of your policy remain of course unaltered by the arrangement." Then he is told that, although he is fully guaranteed by the covenants of the European Society in the deeds between the two companies, yet he may have an indorsement to that effect, or he may have a guarantee policy, or a new policy. The reason of all this is perfectly plain. The contract between the two companies, that the European Society should indemnify the Royal Naval Society though an engagement between the two, of which the Royal Naval Society might sue to have the benefit, would not enure to give the individual policyholder a right to any action or suit against the European Society thereon. The first proposition is—"You shall have an individual engagement between yourself and the European Society, that the European Society will guarantee the Royal Naval Society." That is the one object proposed of the indorsement. The general contract between the two companies would be made by that indorsement to enure to the individual benefit and to the augmented right of each policyholder, who desired to have that extension of the general engagement to himself individually. The second thing, that he is told, is that he may have, if he is not satisfied with that, a guarantee policy. Now both those alternatives are built on the basis of the original Royal Naval policy continuing; and they are things superadded to the existing engagement. And all the difficulty about this matter has arisen from the misapprehension of a primary principle, namely, that there may be two coherent and concurrent obligations, and that the existence of the second obligation may be perfectly compatible with the continued integrity of the first. There are in this particular case, and in several others that have come before me, two obligations. The one is supplemental and subsidiary to the other. Well, then, novation hunters, when they found two obligations, jumped to the conclusion that the second was to be a substitute for, and to be destructive of, the first. There could not be a greater mistake as to the original principle of novation. There is another passage in the Digest, which may be added to the passage drawn from the Institutes which I have already cited (*vide sup.* p. 44), and which is more pertinent to the present case. It occurs in the 46th book of the Digest, second title. After the general observation that all things may become subject to novation—that means only that there was no subject that could be made the subject matter of contract, that might not be made the subject of a change in that contract, or of a substitution of a new contract for the original—that general observation is followed by these words:—

Dummodo sciamus novationem ita demum fieri, si hoc agatur, ut novetur obligatio — cæterum, si non hoc agatur, duæ ernnt obligationes (*a*).

As long as we are perfectly aware that a renewal, or a substitution, will thus be finally effectuated, if this be treated of—if it be the treaty—that the contract be renewed or substituted; but if this be not the subject of treaty, there will be two contracts or obligations.

Now applying that rule, which is the rule of common sense, I ask this question—When Mr. Hort sent in his policy to the European Society, did he send it in, in order that he might receive a new policy in substitution for, in annihilation of, the first? No such thing; *res ipsa loquitur;* he sent it in for an indorsement, which he got. Now in what light was he to regard that indorsement? The answer is given by the letter that was addressed to him. (*Vide, sup.* p. 90.) He may for greater security have an indorsement on his policy. If then we apply the letter, which shows the terms of the treaty between the parties, we shall be bound to come to the conclusion, that there was no question—*hoc non agatur*, in the language I have read—it was not a question, not a treaty, not an application or dealing on the subject of novation, but it was an application and a dealing to have an indorsement by way of further security. Further security to what? Further security to the original policy. Well, then, if there was no treaty on the subject of novation, if that did not enter into the mind of either party, why am I to be asked to do anything so unjust, as to fasten on equivocal language, and make it amount to proof—in the absence of everything like confirmation of the conclusion—amount to proof that the parties were dealing for a novation, and accepted what was given by the one side and taken by the other, as amountiug to novation. Now in the early part of these proceedings I said I would do no such thing. I will not derive inferences or presumptions from equivocal matters, to the effect of destroying men's existing rights, unless I am clear that they met together and treated one with the other, with the intention and for the purpose of effectuating a novation, that is, effectuating the substitution of a new contract in lieu of the old. Now this indorsement, regard being had to the position of the parties, is the most innocent thing in the world; and it would require wonderful ingenuity to pick out of it any circumstance, that should extend it beyond what it plainly means, and make it amount to evidence, that there was an intention to do away with what existed, and to substitute something new. Now the position of these two companies, it must be remembered, was this—the Royal Naval Society had transferred its business to the European Society; the European Society was armed by the Royal Naval Society with authority to receive the premiums in its place; the European Society was made the agent of the Royal Naval Society to receive those premiums; and the assured were informed that they might pay their premiums to the European Society, treating the European Society as the agent only, as the anthorized receiver of the Royal Naval Society. In that state of things, the European Society send back the policy, that was sent in for an indorsement of additional security and not for destruction; they send back the policy with a declaration that, subject to the proviso thereafter stated, the funds and property of the European Society should be liable for the due payment of the 200*l.* of the existing policy, without profits. That is the language of the indorsement. Now, do you destroy a contract that A. shall pay B. 1000*l.* by adding to it afterwards, that not only shall A. be liable, but that B. C. and D. shall also be liable. Well, there you have *quatuor obligationes;* here you have *duæ obligationes*, two obligations to do the same thing. The Royal Naval Society remains bound; the obligation of the European Society is superadded to the existing obligation of the Royal Naval Society. But then, as the European Society has agreed to give the Royal Naval Society that superadded security, on the condition that it was to be the receiver of the premiums, the condition of the superadded security is expressed in the following proviso,—provided always, that the future premiums be duly paid to the European Society. A very necessary proviso, because there is no corresponding contract taken in terms from the assured to pay the premiums. The Royal Naval Society was bound, on the condition of its receiving those premiums, to transfer the right of receiving them to the European Society, and the European Society expresses its obligation to be on the same condition, namely, of the premiums being paid to the European Society. Well, now, what is the condition of Mr. Hort? When he took the indorsement, he put it by the side of the letter, and he said:—"Well, I will not interpose, to object to this union, because my situation remains unaltered; and even if the one discontinues business, and the business is transferred to the other, yet the transfer does not in the smallest degree affect the liability of the original company; and the transfer, so far as I am concerned, is only to bring within my reach, as the person liable, the transferee company." I have no difficulty, therefore, in holding here that Mr. Hort's original policy remains untouched and unaffected; that his original right continues in all its integrity; and that in respect of that original right he has a clear title to claim as against the first contractor, namely, the Royal Naval Society. I must also say, I think there is no doubt it has been very properly considered by Mr. Hort's counsel, that the premium, that became due and that was only for the convenience of the parties split into four quarterly payments, must be paid in full by Mr. Hort.

Ince.—I do not know whether your Lordship proposes to go on to make a declaration as regards the European Society. The scope of your Lordship's judgment is that we have a secondary claim against the European Society.

Lord WESTBURY.—I think so, but that is not an immediate subject of determination. There will be nothing in the order that will preclude you from taking your proper course.

Tuesday, April 8.

Judgment was given in *Scott's* case also.

Lord WESTBURY.—

With regard to *Scott's* case I am very sorry that I gave the parties the trouble of coming

(*a*). The following is the whole of the paragraph:—
Omnes res transire in novationem possunt. Quodcunque enim sive verbis contractum est, sive non verbis, novari potest et transeire in verborum obligationem ex qua cunque obligatione; dummodo sciamus novationem ita demum fieri, si hoc agatur, ut novetur obligatio; cæterum si non hoc agatur, duæ crunt obligationes.—Digest Lib. 46, Tit. 2, par. 2.

here again to hear judgment upon the matter, for I ought to have decided it at the time. Looking at it again, I am astonished that I felt any difficulty, because the words, "with profits" are plainly words that are a representation only of the description of the policies, his policies with the Royal Naval Society being policies with profits, whereas Mr. Hort's policies are without profits. I must hold, therefore, that there is no novation in the case of General Scott, and that he also is entitled to claim as against the Royal Naval Society. Now, these things have been brought forward, I suppose, by common consent, and perhaps it may be useful to have them discussed, in the hope that there may not be another repetition of this subject; therefore, with that hope, I shall give to the two claimants, General Scott and Mr. Hort, their costs out of the Royal Naval Society's estate; and, of course, the official liquidator, who has done quite right in having this fully examined, will have his costs out of the estate also.

Solicitor for General Scott, *W. T. Manning.*

Solicitor for Mr. Hort, *T. Donnithorne.*

Solicitors for the official liquidators of the Royal Naval Society, *Mercer* and *Mercer.*

Thursday, Feb. 6. (*a*)

Joshua Murgatroyd's Case.

In a case of a similar character to Bentinck's case, *ante, p.* 99, *an order was made for the case to stand over, with liberty for the transferor, within three weeks, to pay the call that had been made, and so bring himself into the position of being able to fulfil his contract with the transferees. They must then be brought before the court with a specific application against them to have the contract enforced.*

There was an important difference between this case and Bentinck's case. *In the latter, on the expiration of the fourteen days, the transferor had tried as far as he could to complete the contract until he was prevented by the proceedings on the petition to wind-up; whereas in this case from Dec.* 1869 *to June* 1871, *the date of the presentation of the petition to wind-up, no attempt was made to have the contract completed.*

This was a case of a similar character to *Bentinck's case, sup.* p. 99—with reference to an incomplete transfer of shares.

The deed of settlement of the European Assurance Society, provided in clauses 96 and 97, that any shareholder might give notice in writing to the directors of his wish to transfer his shares, and request them to certify their approval or disapproval of the person to whom he proposed to transfer the shares; in the notice he was to describe the full name and the profession or calling, and the place of abode of the proposed shareholder; and if such person should be approved of, or if the directors should not within fourteen days propose some other person to take the shares, proposed to be transferred, at the then market price (in which case the person so proposed should be considered as approved of by them), then the shareholder might, according to a form to be sanctioned by the directors, transfer the shares to his own proposed transferee, who thereupon might, on executing at the office of the company, or at some other prescribed place, the deed of settlement, or a covenant to abide by the provisions of the deed, be entitled to call upon the directors to place his name on the register of shareholders, as the proprietor of such shares; and no share was to be transferred to any person, who had not been first approved of, or considered as approved of by the directors; and if any transfer should be made, or attempted to be made to any person who had not been so first approved of, such transfer was to be void: (*vide* clauses 96 and 97 *sup.* p. 11.)

Mr. Murgatroyd was the holder of 500 shares in the European Assurance Society, and on the 1st Oct. 1869, he executed a transfer of a portion of them to Mr. Barker, of Rusholme, Manchester, an agent of the society, the consideration being left a blank in the deed. And on the same day he executed a transfer of the remaining portion of them to Mr. Marshall of Denton, near Manchester, hat trimming manufacturer, in consideration of 5*l.* However, no consideration was paid by either transferee. The transaction was carried out through a Mr. Clegg, a sharebroker, of Manchester, who subsequently wrote to the society as follows:

The Secretary of the European Assurance Society. 18th Oct. 1869.

Dear Sir,—Inclosed I send you two notices of transfer, as follows:

1st. For conveyance of 200 shares in your society, numbers 142,041 to 142,240, from J. Murgatroyd, of Wellington-road, Stockport, to Robert Marshall, of Denton, near Manchester, hat manufacturer, certificate No. 3260, representing the 200 shares inclosed. 2nd. For conveyance of 300 shares in your society, Nos. 58,051 to 58,320 (for 270), 10,781 to 10,810 (30 shares), from Joshua Murgatroyd, as above, to Barker, of Rusholme and Victoria-street, Manchester; certificates Nos. 3258 and 3259, representing the 300 shares, are also inclosed.

For which please prepare transfer deeds, and forward them to me as early as convenient. Stamps value 3*s.*, amount of stamp fees, are also inclosed. Your attention will oblige—Yours, Wm. Clegg.

It was now alleged by Mr. Clegg that these certificates for the shares were inclosed in these letters, and that they were retained by the society; they could not, however, now be found. The notices of transfer were kept by the society.

On the 16th Oct. 1869 it had been resolved by the directors of the society that the share clerks be instructed not to register or pass any transfer of shares until further order; but this resolution was never brought to the knowledge of Mr. Murgatroyd. The reason for this resolution was that a petition had then been recently presented for winding-up the society, and that the society was then in a condition of doubtful stability. This condition continued, and was notorious down to the presentation of the successful petition on the 10th June 1871. Mr. Murgatroyd, however, now alleged that he was not aware of the pendency of the first mentioned petition, when he executed the transfers.

A call of 10*s.* per share was made on the 23rd Nov. 1869, payable in two instalments of 5*s.* each, on the 13th Dec. 1869 and on the 14th March 1870 respectively.

On the 30th Nov. 1869 Mr. Clegg forwarded the two deeds of transfer to the society in the following letter:—

Dear Sir,—Joshua Murgatroyd, of Wellington-road, Stockport, has this morning handed to me inclosed notice of call No. 977, first of 5*s.*, being 125*l.*; also your letter giving reason for such call, which I also inclose. On reference

(*a*) Heard in the second sittings.

to your file of letters, received by you on the 19th Oct. last, you will find I forwarded to you two notices of transfer, first, from Joshua Murgatroyd to Robert Marshall, for conveyance of 200 shares 142,041. to 142,240; secondly, from ditto to Philip Barker, of 2, Victoria-street, and Rusholme, Manchester, for conveyance of 300 shares, Nos. 58,051 to 58,320, and 10,781 to 10,810. Certificates representing both lots of shares were also inclosed; also postage stamps for your transfer fees, and *ad valorem* stamps. The call was paid the 31st July 1869, to Messrs. Charles Hopkinson and Co., bankers. The call being made in April, you will perceive that Mr. Murgatroyd lost little time in meeting it. I have repeatedly written about this matter, as well as others I have forwarded to your office, but no replies have been received by me, although I am given to understand that your books have been open for the transfer of shares for some time past. I now inclose you two transfer deeds, duly signed and attested by the seller and purchasers for the above shares. They are such as are used on the Stock Exchange. Please present them to your board, and forward me new certificates in favour of Philip Barker and Robert Marshall, and please forward them, the call duly apportioned.

The manager replied:

W. Clegg, Esq. 6th Dec. 1869:
Dear Sir,—I retain transfers Murgatroyd to Barker, and Murgatroyd to Marshall, which shall be placed before the committee of transfers. In the meantime, I return call notice letter, &c. H. B. PARMINTER.

On the 7th Dec. 1869, Mr. Clegg wrote to the manager:

I am obliged to you for retaining transfer Murgatroyd to Barker and Murgatroyd to Marshall, and for your promise to place same before the committee of transfers. The call notice letter, No. 977, in name of Joshua Murgatroyd, Esq., of 74, Wellington-road, Stockport, which you have returned to me, I am again instructed to forward to you that you may apportion same to Barker and Marshall, who took up the shares from the said Joshua Murgatroyd, agreeing at same time to pay all future calls in respect of the shares.

The manager replied:

W. Clegg, Esq. 8th Dec. 1869.
Dear Sir,—Yours of the 7th to hand, again returning call notice in favour of Murgatroyd, which I will attach to the transfer, and have all submitted at to-morrow's committee.—Yours faithfully, H. B. PARMINTER.

The two transfers were submitted to the directors, who declined to register them, until the call of 10*s.* per share should be paid. The manager thereupon sent back the transfers to Mr. Clegg, with the following letter:

W. Clegg, Esq. 9th Dec. 1869.
Dear Sir,—The transfers Murgatroyd to Barker and Marshall have been placed before the board, and they are prepared to register same when the call of 10*s.* per share is paid. I return the transfers and call notice.—Yours faithfully, H. B. PARMINTER.

The call was never paid by Mr. Murgatroyd, and on the 10th March 1871, an action was commenced against him in the Queen's Bench to recover the amount.

The official liquidators now contended that during the financial crisis of the society Mr. Murgatroyd had attempted to get rid of his shares, in order to escape the liability on them; but that this attempt had been unsuccessful, and his name being still on the register, he ought to be placed on the list of contributories.

Mr. Murgatroyd, on the other hand, contended that he had not paid the call because he had *de jure* ceased to be a shareholder; and that, but for the default of the directors, his name would not now have been on the register.

Montague Cookson appeared for the official liquidators.

Jackson, Q.C., and *J. Henderson*, for Mr. Murgatroyd, were willing to submit to the same order as in *Bentinck's case* (sup. p. 99), viz., that the call should be paid by Mr. Murgatroyd, and that thereupon the transferees' names should be substituted upon the register.

Renshaw, for Mr. Barker, objected to such an order being made, and said the case might be distinguished from *Bentinck's case*.

[LORD WESTBURY.—How can I deal with this case, unless these gentlemen, with whom Mr. Murgatroyd dealt, admit the validity of the deeds of transfer?]

Jackson.—The case is very much the same as that of the forty-five shares in *Bentinck's case*.

[LORD WESTBURY.—At present you are not in a condition to make a transfer to Barker and to Marshall. If you can come here and show me that you have paid the call, and that Barker and Marshall are bound by their contract with you, and that they are proper persons, then we can have an order to put them on. You have had from Dec. 1869 to June 1871, to complete this transaction in the ordinary way and in conformity with the deed of settlement. You have done no such thing. You were told that, if you paid 10*s.*, the deeds would be registered; you elected to do no such thing. There is a very important difference between this case and *Bentinck's case* (*sup.* p. 99), for, as soon as the fourteen days had elapsed, Mr. Bentinck tried as far as he could to complete the contract, but the company were not able to complete it by reason of the proceedings that were taken against them. You have had an interval of time here from December 1869, down to the time of the presentation of the petition, to accomplish all this.]

Jackson.—Mr. Murgatroyd's position was this—that, as he had not only executed a transfer to other persons, but had given notice of the fact of that execution to the company, and as they had not availed themselves of their power of objecting to his transferee, he was no longer *de jure* a member, and therefore was not liable to pay this call. He considered that the directors, by attempting to impose this condition on him, were doing what they had no right to do.

LORD WESTBURY.—

All that I can do is, to let the case stand over, with liberty to you to pay the call and bring yourself into the situation of being able to fulfil your contract with Barker and Marshall. They must be brought here with a specific application against them to have that contract enforced and carried into execution. Then the official liquidator will take care, if he sees any objection to the admission of Barker and Marshall, to have that objection stated in the proper form, either by affidavit or otherwise. The call must be paid within three weeks.

Solicitors for Mr. Murgatroyd, *Sladen* and *Mackenzie*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

Wednesday, Jan. 22. (*a*)

GAMMON'S CASE.

Company — Winding-up — Contributory — Alleged transfer of shares "to the company or its nominee." The executors of a proprietor of shares, who alleged that they had in 1864 *executed a transfer of the shares "to the company or its nominee," but who had allowed their names to remain on the company's register down to the winding-up in* 1872, *Held, never to have entered into a final contract for the sale of the shares; and consequently their names were placed on the list of contributories.*

THIS was an application by the executors of Mr. Gammon for the removal of their names from the list of contributories to the European Society.

Mr. Gammon died in 1864, and at the time of his death held fifty shares in the society. Shortly afterwards the following correspondence took place between Mr. Cleland, the London manager of the society, and Mr. Thomas Morris, their agent at Birmingham.

18th June 1864.

Dear Sir,—. . . I can obtain a purchaser for the late Thomas Gammon's shares (50) for £20. Before, however, any transfer takes place, it will be necessary to forward the probate of the will to this office for registration.

T. Morris, Esq. W. CLELAND, Manager.

Birmingham, 22nd June 1864.

Dear Sir,—Please prepare the transfer for the fifty shares belonging to the late Thomas Gammon. The probate of the will shall be sent you in course of post.

W. Cleland, Esq. THOS. MORRIS.

Birmingham, 27th Sept. 1864.

Dear Sir,—Referring to your favour of 18th June last, I am this morning in receipt of probate of the will of the late Thomas Gammon, which is forwarded you by book post, and I shall be obliged by your sending me form of transfer for the fifty shares, with cheque for the amount (£20). THOS. MORRIS.

W. Cleland, Esq.

30th Sept. 1864.

Dear Sir,—I return herewith per book post probate of will of the late Thomas Gammon, having duly registered the same in the books of the society. I inclose a form of notice of transfer for these shares, which you will please have filled up, and return it to me when the deed shall be prepared. W. CLELAND, Manager.

T. Morris, Esq.

Full evidence as to the details of the alleged transaction could not be procured, in consequence of the absconding of a local agent. But Mr. Goode, one of the executors, now alleged in his affidavit:—

In or about November 1864 the executors entered into negotiations for the sale of the said shares to the office, and finally a bargain was made to sell the said fifty shares for £20. In the month of Dec. 1864 I signed a transfer of the said shares to the said office or their nominee, in consideration of a sum of £20, agreed to be paid to the said executors for the same shares. I further say that, since the 14th Oct. 1863, no dividend or bonus has been received by me or either of the said executors, on account of the same shares, nor has any notice of the declaration of a dividend or bonus, or of the calling of meetings in reference to the said company, been given to me or either of the said executors.

Mr. Evans, the managing clerk of the executor's solicitors, now alleged in his affidavit:—

On the 30th Dec. 1864, I attended Mr. Morris, the then manager of the Birmingham branch of the European Assurance Company, with a transfer to the said European Assurance Society or their nominee, of fifty shares in the said company for 20*l*., signed by Elizabeth Savery Gammon, John Graham, and William Goode, the executors of the late Thos. Gammon. . . . In January 1865 I was instructed to see Mr. Morris, and ask him why the money was not paid over; and in consequence of such instructions, from the month of January 1865, up to about the year 1666, I repeatedly saw Mr. Morris. . . . On the first occasion of my seeing him, he told me that he had heard from the head office, that the transfer from the executors to the company was completed; and on every subsequent occasion repeated the statement, and added that he could get no answer from the head office as to the money, which they had agreed to pay to the executors, but that he would write the office again.

The books of the society had been searched with the following results:—

In the shareholder's interest book up to and including June 1863, there were entries of payment of interest to Mr. Gammon. Subsequent to June 1863, there were no entries of any interest having been paid to Mr. Gammon or his executors. The letters written from the head office to the agent at Birmingham, directing the payment of interest to shareholders, included the names of the executors up to and including the letter from the society to the agent, dated the 21st Jan. 1864. In the next letter, dated the 19th July 1864, and in all subsequent letters, the directions to the agent for the payment of interest did not include the name of Gammon's executors. In the share ledgers of the society there was an entry of a bonus for the years ending the 31st Dec. 1860, 31st Dec. 1865, upon the fifty shares of £3 15s., credited but not paid. Calls were made on the fifty shares in July 1869, Dec. 1869, June 1870, and May 1871; these were all debited, but had not been paid. On the 12th Jan. 1872, the date of the winding-up order, the executors were the registered holders of the shares.

No trace of the alleged transfer could be found in the books of the society.

Waller appeared for the executors.

Montague Cookson for the official liquidators of the society.

Lord WESTBURY.—

It is painful to see such things. It is a very common exhibition, namely, of roguery on the one side and negligence on the other. Whether that roguery, as no doubt it was, is to be laid at the door of Morris or of Cleland, I do not know. There was very great negligence, no doubt, and it is not difficult to see at whose door that must be laid, namely, it must be laid at the door of the solicitor concerned for these parties at this time. That, however, appears to have been Morris, the person, no doubt, to whom the money was paid; he received the money and appropriated it to his own use. This is a most speculative proceeding — a proceeding as speculative as I have ever met with. If these executors come here to have another name put upon the register, they are bound to show me that they did contract with a certain individual for the sale of these shares. They are bound to show me that that contract was duly completed, in such a manner that that individual could be substituted for them upon the register of shareholders. They have no evidence of any contract; they have no proof of any dealing with any individual; but they produce a transfer in the most extraordinary form, which nobody with any common legal knowledge would have accepted or made, namely, a transfer to the office or their nominee. They have not shown me that the office had any power to contract for the purchase of these shares, or that they did so, or that Cleland was authorised so to do. The whole thing, therefore, utterly fails. All that I can say about it is, that they have been defrauded by Morris, who acted for them in a double way—first, if he did receive the money, the society have never had a shilling of it; and, secondly, if he did make a contract with Cleland, he neglected, or was careless about ascertaining, whether that was carried into effect. But I find

(*a*) Heard in the second sittings.

facts, which are indisputable, and which prove beyond a possibility of doubt, that there never was a final contract, or a contract capable of having effect given to it, because this is represented as having taken place in 1864; but the names of the executors remain upon the register and in the books of the company down to the last moment, namely, down to the winding-up. That would not have been the case, if there had been any contract for a sale to an individual, nor if there had been a valid contract for a sale to the company. I must hold, therefore, that there is no justification whatever for the attempt to get themselves taken off the register. Now I must not give encouragement to hopeless applications of this kind, and if the official liquidators think proper not to ask for costs, let it be so. I do not know how I can deal with the next unfounded case, if these executors are let off the necessity of paying costs; but as it is a case of fraud, and protesting against its being cited hereafter, I will dismiss this application without costs.

Solicitors for the executors, *Church, Sons,* and *Clarke.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Tuesday, April 8.

Gunn's Case.

Company — Winding-up — Contributory — Executor placed on a list of contributories in his own right.

A testator holding some shares in a company died in 1863. *The residuary estate included these shares, and was given by his will to his widow, the executrix, for life, with remainder to his children. The dividends were subsequently paid to the executrix, and receipts given by her in her own name. In July* 1864, *the name of the executrix was returned by the company to the Registrar of Joint Stock Companies, as the holder of the shares. In August* 1864, *changes were made in the number and constitution of the shares, and the company sent to the executrix certificates for the shares in their new form, certifying that she was the proprietor of the shares. In the books of the company, also, she was entered as the proprietor of the shares. There were, however, some sections in the company's deed of settlement, directing that certain things should be done in the case of an executor being desirous of becoming a proprietor of his testator's shares, and these provisions had not been followed; the deed also provided that both the register and the certificates should be evidence of the proprietorship of any shares.*

In the winding-up in 1872-3, *the official liquidator contended that the executrix ought to be placed on the list of contributories in her representative, and not in her personal, capacity.*

Held that the executrix had been dealt with by the company in the character of a shareholder, and that the company could not, after the lapse of time, turn round and treat everything that had passed between themselves and the executrix, as amounting to nothing; and that, accordingly, she must be put upon the list of contributories in her personal, and not in her representative, capacity.

This was a question as to whether Mrs. Naomi Gunn was to be placed on the list of contributories to the British Nation Association in her own right or in her capacity of executrix.

Mr. Gunn held twenty shares in the British Commercial Company; in 1860 this company transferred its business to the British Nation Association, and in accordance with the arrangement for the transfer, Mr. Gunn received 120 shares in the British Nation Association in respect of his British Commercial shares. Five shillings was credited as paid up on each of these 120 shares, so that his paid-up capital was altogether 30*l.*

In Nov. 1863 Mr. Gunn died. By his will his residuary estate (in which term his shares in companies were expressly included) was given to his widow and executrix, Mrs. Naomi Gunn, during her life or widowhood, with remainder to his children.

On the 12th May 1864 the following receipt was given by Mrs. Gunn for the interest on the shares, which was paid to her:—

Received of the British Nation Life Assurance Association the sum of 1*l.* 18*s.* 9*d.* being interest to the 31st March 1863 at the rate of 6*l.* per cent. per annum on 120 shares held by me in the said Association.

Naomi Gunn.

On the 14th July 1864 Mrs. Gunn's name was returned by the Association to the Registrar of Joint Stock Companies, as a holder, at that date, of 120 shares in the Association.

In July 1864 Mrs. Gunn wrote to the Association as follows:—

26th July 1864.

Sir,—When last I called at 316, Regent-street, I was informed I should be entitled to a dividend in June, of which I have heard nothing more; and as I was served in the same way once before, having called at the office and received my dividend many months after it was due, and never having any notice of the same, will you please to inform the reason, and you will oblige yours respectfully,

Naomi Gunn.

The manager of the Association wrote in reply:—

27th July 1864.

Madam,—As the dividend for 1863-4 will be payable on the 1st. Aug. next, I desire to explain to you, before that time arrives, your present position as a shareholder of this Association, with the view of placing you on the same advantageous footing as the rest of the British Nation shareholders.

At the time of the transfer of the business of the British Commercial, and your becoming a shareholder of this company, it was suggested that, whereas the British Nation shareholders generally were credited with 2*s.* per share, the British Commercial shareholders should be credited with 5*s.* per share. This was considered at that time to be an advantage to the British Commercial shareholders, inasmuch as it was thought that, if a call were made upon the British Nation shareholders, those who were credited with 5*s.* per share already would not be called upon to pay any part of that call, until the other shareholders of the British Nation had paid up to the 5*s.* per share. If there were anything in this at the time of the transfer, which weighed on the minds of the British Commercial shareholders, the subsequent great prosperity of this company has entirely done away with it, and now the British Commercial shareholder is actually in a worse position than the British Nation shareholders would be.

The shares of the British Nation were originally 1*l.* per share with 2*s.* paid, but have since been consolidated into 10*l.* shares with 1*l.* paid. You at present hold 120 1*l.* shares with 5*s.* paid, making your capital 30*l.* The 10*l.* shares, with 1*l.* paid up, have a bonus of 3*s.* per share added. Thus your paid-up capital being 30*l.* would give you thirty 10*l.* shares, with 3*s.* per share added as bonus, making your account stand credited in our books with 34*l.* 10*s.*, instead of 30*l.* as at present.

This arrangement would make your shares similar to those of the British Nation shareholders, and would give you an advantage in every future bonus declared. In the present instance, the alteration would entitle you to a further dividend of 8*s.* 8*d.*, which would be paid with the forthcoming dividend, upon my receiving your reply assenting to this arrangement. I should require your original certificate, to alter it into 10*l.* shares and indorse the bonus upon it. I may remark that of those who took shares in this company, all now but yourself have accepted the shares of the British Nation Association.

HENRY LAKE,
Mrs. N. Gunn. Manager.

With reference to this proposal to change the number and constitution of the shares, in Aug. 1864 the secretary of the association sent the following letter to Mrs. Gunn:—

9th Aug. 1864.

Madam,—The proposed alteration in your shares will not cause you to have to pay more money; neither do we contemplate making a further call. Our only object is to simplify our books by assimilating the shares. I shall be glad to receive your certificate to be exchanged.

DALTON EASUM, Secretary.

Mrs. Gunn wrote in reply:—

9th Aug. 1864.

Sir,—I enclose my certificate, and request you to send the other at your earliest convenience,

NAOMI GUNN.

D. Easum. Esq.

The secretary shortly afterwards wrote:—

19th Aug. 1864.

Madam,—I herewith enclose to you certificates for your thirty shares in this association. Please acknowledge the receipt. D. EASUM, Secretary.

Mrs. N. Gunn.

One of these two certificates ran thus:—

This is to certify that Mrs. Naomi Gunn, of No. 140, New Kent-road, London, is the proprietor of the twelve shares, Nos. 21,404 to 21,415 inclusive, in the British Nation Life Assurance Association, subject to the rules and regulations of the said association, and that up to this day there has been paid in respect of such shares the sum of 12*l.* Given under the common seal of the said association the 31st day of March 1863.

and was indorsed:—

The within named shares have been further credited by a bonus of 3*s.* per share, making 23*s.* per share paid-up thereon.

The other certificate was of the same form, and certified that she was the proprietor of eighteen shares. In this certificate, however, the date was left a blank.

In the dividend schedule for the 31st Mar. 1864, Mrs. Gunn was inserted as the proprietor of thirty shares in the association, representing a capital of 34*l.* 10*s.* (including bonus), one year's interest thereon being computed at 2*l.* 1*s.* 5*d.* And the dividend book contained an entry:—

GUNN NAOMI, thirty shares, 34*l.* 10*s.* One year's interest, 2*l.* 1*s.* 5*d.*

In the register book of the association the entry, under Mr. Gunn's name, of 120 shares was erased, and there were entered twelve and eighteen shares. And Mr. Gunn's name was erased and an entry made:—

Died 16th Nov. 1863. Probate produced by Mrs. Naomi Gunn, widow, of same place, executrix.

In March 1865 the British Nation Association transferred its business to the European Society; and the arrangement for the transfer was that each shareholder should receive three shares in the European Society in respect of each of his British Nation Association shares. Accordingly Mrs. Gunn received 90 shares in the European Society; and she executed the deed of amalgamation, in which it was recited that she was a proprietor of shares in the British Nation Association.

In the winding-up in 1872-3, Mrs. Gunn was placed on the list of contributories to the European Society in her own right. Moreover, the liability on the British Nation Association shares not having been destroyed by the amalgamation (*Pownall's case, sup.* p. 8), the official liquidators sought to place Mrs. Gunn on the list of contributories to the British Nation Association with regard to the twelve shares in her capacity of executrix, and with regard to the eighteen shares in her personal capacity; there being, as they alleged, a distinction between the two sets of shares, inasmuch as Mr. Gunn had never claimed all the shares to which he was entitled, and consequently they were compelled to treat Mrs. Gunn as having acquired the eighteen shares in her own right, and as being liable on the twelve shares as executrix.

On the 19th Dec. 1872 the Assessor of the arbitration (Mr. Reilly) had settled Mrs. Gunn on the list of contributories in her own right with respect to all the shares. This decision was now appealed against by the official liquidators, as regards the twelve shares.

The deed of settlement of the British Nation Association contained the following provisions with reference to the shares of deceased proprietors, and with reference to the register and the certificates being evidence of the proprietorship of any shares.

Clause 9:

That the male and unmarried female proprietors of the association in respect of the shares in the capital thereof, and the husbands of married female proprietors in respect of their wives' shares in such capital, and the executors and administrators of deceased proprietors in respect of the shares of such deceased proprietors in the same capital, and the legatees of the shares of deceased proprietors in respect of shares, to the bequest of which to such legatees the executors or administrators with the will annexed shall have assented by some writing under their hands left at the offices of the association, and the assignees of bankrupt or insolvent proprietors in respect of the shares of such proprietors in the same capital, shall for the purposes of these presents be considered holders of such shares respectively; and in the several cases above referred to, no other person or persons, notwithstanding any interest whatsoever, which he, she, or they may have in such share or shares in the said capital, shall be deemed or considered as a "holder or holders" of such share or shares. . . .

Clause 196:

That whenever such notice as hereinafter is mentioned by any holder, being the husband of a female proprietor, or executor, or administrator of a deceased proprietor, desirous of becoming or having procured some person to become a proprietor in respect of any share held by such holder in any of those capacities, or by any holder being the assignee of a bankrupt or insolvent proprietor having procured some person to become a proprietor in respect of any share held by such holder in that capacity, or by any other holder being a proprietor having procured some person to become a proprietor in respect of any share held by such holder, shall have been left at the office of the association, the board shall proceed without delay to take such notice into consideration, and shall, under the hands of three directors, certify to the holder giving the notice their approval or disapproval of the proposed proprietor, and if the person proposed in such notice shall be disapproved of, the board shall within three calendar months thereafter purchase such share for and on behalf of the association, at the then market price or value thereof, provided the said board shall have obtained from a general meeting power to purchase such share, and shall, if the person proposed in such notice shall be approved of, in the case of a holder of shares desirous of

becoming a proprietor, forthwith, on such approbation being so certified as aforesaid, and in case of any holder, or of the board of directors, having procured some person to become a proprietor as aforesaid, forthwith, on the deed, by which such share shall have been transferred, having been left at the office of the association, cause (either at the expense of such proprietor or at the expense of the association, at the option of the board) his name to be certified in the share register book as the new proprietor of such share, and shall at the same time, (either at the expense of such holder or at the expense of the association, at the option of the board) cause such entry, erasure, or other alteration to be made in the share register book as they shall think fit, for the purpose of making it appear therein that the last proprietor of such share, and all persons claiming under him, except the person procured to become a proprietor in respect of such share, is or are no longer entitled thereto; and after such entry, erasure, or other alteration as aforesaid shall have been made as aforesaid, the board shall at any time, upon the requisition of such holder, at his expense or at the expense of the Association, at the option of the board, deliver, or cause to be delivered, to him a certificate in writing, signed by three directors, of such entry, erasure, or other alteration, and such certificate shall be in such form as the board of directors shall think fit. . . .

Clause 281:

That the register of shareholders shall, as between the association and every person claiming to be a proprietor of the association in respect of any share in the capital thereof, be conclusive evidence on the part of the association to show whether he is a proprietor of the association in respect of such share; and in case of every purchaser of any share, the entry of his name in "the Register of Shareholders" shall be conclusive evidence, both at law and in equity, of his right and title to the share which he shall have purchased.

Clause 282:

That any certificate to be given by the board to any present or future proprietor shall, as between the association and such proprietor, be conclusive evidence on behalf of such proprietor, that he is a proprietor of the association in respect of the share or shares mentioned in such certificate, and such certificate shall continue to be such conclusive evidence until such entry or alteration as hereinbefore mentioned shall have been made by the board of directors in "the Register of Shareholders" for the purpose of making it appear therein that the proprietor of the share or shares mentioned in such certificate is no longer entitled to such share or shares.

Napier Higgins, Q.C. and *Montague Cookson* appeared for the official liquidators.

[Lord Westbury.—The real point is this. You have dealt with this Mrs. Gunn as if she were not an executrix, but a proprietor in her own right; and have so gone on for a number of years. Now you turn round upon her, and say we will make an arbitrary division of these thirty shares into two classes, eighteen and twelve. You shall be put on as a contributory, as the owner of the eighteen; but in respect of the twelve, we will resort to your husband's assets. Why are you entitled to resort to the assets in respect of the twelve and not in respect of the eighteen?]

Napier Higgins.—It may be that we were entitled to go against the assets in respect of the whole thirty, but the official liquidators have thought proper to submit to the decision, which has been arrived at by the Assessor in respect of the eighteen, and to contest the decision as to the liability on the twelve shares.

[Lord Westbury.—The decision of the Assessor, which you have submitted to, is utterly at variance with your now stamping the remaining twelve shares with a different character.]

Napier Higgins.—Mr. Gunn was, at his death, the holder of 120 shares, and his estate cannot be freed from the liability in respect of those shares, except according to the provisions of the deed of settlement. Clauses 9 and 196 provide what is to be done in the case of an executor being desirous of becoming a proprietor of his testator's shares.

[Lord Westbury.—There is no necessity for a deed in the case of an executor. Clause 196 is drawn jumbling up transfers by assignees, and other transfers. The executrix is to carry in a notice of her desire to become a proprietor; and thereupon some things are to be done. In the meantime, in order to prevent the business of the company from coming to a standstill, the executrix, without going through these preliminaries necessary to effect a change of ownership, is to be regarded as the proprietor. . . . The real difficulty is this: This man, when he died, was the registered proprietor of 120 shares. Then it appears you took them out of his name and put them into the widow's name, and you did not at all pursue the directions of your own deed, but you entered her actually as if she had been herself the original proprietor of the 120 shares; and you have dealt with her accordingly, without the smallest reference to her being nothing more than executrix. Now, after so many years of dealing with her in that capacity, can you turn round and say, "You have never lost your original character of executrix, and therefore we have a right to resort to the assets of your husband in respect of these"—we will call them twelve shares—but you might have said "in respect of these thirty shares." Everything that was done was inconsistent with the deed, because all the directory provisions, as applicable to the case of a testator and his executrix, were wholly disregarded.]

Everitt appeared for Mrs. Gunn, but was not called upon.

Lord Westbury.—

The application before me is to make the estate of a gentleman named Gunn, who died in Nov. 1863, liable to the company in respect of twelve shares. At the time he died, he held 120 shares in the British Nation Association. They appear to have been afterwards converted into thirty shares. And so far as his widow took part in that conversion, she appears to have been treated by the company as proprietor of the 120 shares. Now Mrs. Gunn has been put on the list of contributories in her own right in respect of eighteen shares; and that is not disputed by the official liquidator. The liability in respect of the eighteen shares is not to be distinguished from the liability in respect of the twelve. It would be a very singular thing, if she, being a contributory in her own right in respect of the eighteen shares, that are not distinguishable from the twelve shares, were to remain on this list of contributories, as liable in her own right in respect of the eighteen shares, but now liable only in her representative character in respect of the twelve. I think, first, it is much too late to come now, and in effect seek to rehear and to reverse the decision with respect to the eighteen shares. If she had been held to be liable in her own right in respect of the eighteen shares (and that remains unquestioned) it is in effect *res judicata* with respect to the twelve; for the two things are not distinguishable. How in the world a distinction was drawn between the eighteen and the twelve, passes my comprehension. For the only account that we have of the division of the thirty into eighteen and into twelve, arises in

this way—that when the manager sent Mrs. Gunn's certificate of her holding thirty shares, he sent her one certificate which applied to eighteen, and he sent her another certificate in respect of the remaining twelve. But the reason for sending them, the right in which she received them, the capacity in which she was to hold them, were all precisely the same with regard to the twelve that they were with regard to the eighteen. There is some suggestion made in some part of this very erroneous case that it might have been done, because Mr. Gunn had claimed the twelve shares, but had not claimed the eighteen. But Mr. Gunn was dead, and his death preceded the conversion of the 120 into thirty shares. Now this company has dealt, in respect of the thirty shares, with Mrs. Gunn alone in her personal and individual character. They have never been solicitous to preserve the evidence of her holding in her original representative character; but they have made returns to the public registry, and have given to her individually certificates which, as between her and them, are conclusive that she holds all in the character there represented, simply of being a widow, and upon the face of which there is not the slightest reference to her representative character, or to the capacity in which her husband held the 120 shares. All that is ignored and passed over. The inquiry into it is superseded by the fact that she holds from them a document, being conclusive evidence of title, that she held the original 120 shares simply in the personal character of widow, without any reference to the title of her husband. But when they were converted into the thirty shares, she received two new certificates from the company. One of them says, "This is to certify that Mrs. Naomi Gunn is the proprietor of the twelve shares." The other says, "This is to certify that Mrs. Naomi Gunn is the proprietor of the eighteen shares." And now I am gravely asked to disregard all this, to fall back upon the original title of old Mr. Gunn, under whom the shares were derived, and to treat all this which has passed as amounting to nothing, and to hold the assets of Mr. Gunn liable to calls upon these shares. As between Mrs. Gunn and this company, I will keep the company to the character in which they have treated her. As between Mrs. Gunn and this company, I will hold that they are not at liberty to treat her otherwise than in her own personal and individual character of proprietor of these thirty shares. They dealt with her as owning the shares for the purpose of that conversion. When the conversion was made, they dealt with her as the rightful owner of the converted shares, and they sent her two certificates together, representing her as the proprietor of the thirty shares. I will not alter that. It does not at all affect any question as between Mrs. Gunn and the beneficiaries under the will. But it affects the question, whether this company is at liberty to disregard all that it has done, to pursue a course perfectly different from the course which it actually did pursue, and now to substitute for the proprietorship, which they recorded publicly and in their own books, a new proprietorship, namely, the proprietorship of the original testator. I can do nothing of the kind. Whether it will be beneficial to the company or not, I do not know. But I must take it as they have represented it, and therefore as between them and her, that is, for the purpose of the question of contributorship, I must hold her to be a contributory in her own right, and in that way her position with regard to the twelve shares will be wholly consistent with the position which she now occupies, without any attempted disturbance on the part of the company, in respect of the eighteen shares. The official liquidators having made the application, must pay the costs. They will have to pay the costs of to-day, and the costs of attending the applications before the Assessor.

Solicitors for Mrs. Gunn, *Fielder* and *Sumner*.

Solicitors for the official liquidators of the British Nation Association, *Mercer* and *Mercer*.

Tuesday, April 8.

CONQUEST'S CASE.

(*Vide sup.* p. 67).

Life assurance company — Winding-up order — Policy—Default in payment of premiums—Date of winding-up order.

In consequence of the order to wind-up the European Society on the 12*th Jan.* 1872, *a policyholder in the Wellington company, whose business had been transferred to the European Society, omitted to pay his premium that became due on the* 22*nd May* 1872.

Held, that in the interval between the premium becoming due and the 25*th July* 1872, *the time of the passing of the European Society Arbitration Act, there was no hand competent to receive the premium; the European Society, the agents of the company, being in process of being wound-up, and there being no office of the Wellington Company at which premiums could be paid. Thus there was no default in paying the premium, and the policy had not dropped; and the policyholder was entitled to have the Wellington Company wound-up.*

The order to wind-up a subsidiary company, not made to date from the date of the order to wind-up the principal company, but from the actual date of the order to wind-up the subsidiary company.

IN this case it had been decided (*vide sup.* p. 67) that Mrs. Conquest was entitled to prove on her policy against the Wellington Reversionary Annuity and Life Assurance Society, there having been no novation with any other company.

An application was now made on her behalf to wind up the Wellington, &c., Society. The application had been served on Dr. Power and Mr. Beasley, two of the former directors of the Society, Lord Henry Gordon, the other director at the time of the transfer to the British National Association, being dead.

The last premium, that had been paid on the policy, was paid on the 22nd May 1871, to the European Society. Accordingly, another premium should have been paid on the 22nd May 1872, or reckoning the thirty days' grace, on the 21st June, 1872. The order to wind up the European Society having been made on the 12th Jan., 1872, this premium was not paid. It was now contended, on the part of the directors, that the policy had dropped, in consequence of the non-payment of this premium during the interval between the 22nd May 1872, and the 25th July 1872, the date of the passing of the European Society Arbitration Act 1872. This Act provided that—

Sect. 9, (1):

The arbitrator shall have such powers and authorities as an arbitrator appointed by consent of parties, or by order of a court, or of a judge, has at common law, or by statute, or otherwise; and, in addition thereto, and to the powers and authorities expressly given to him by this Act, he shall have all the powers, authorities and jurisdiction vested in or exercisable by the Court of Chancery, or a judge thereof, in court or at chambers, in the liquidations of any of the scheduled companies pending at the passing of this Act, and all such powers, authorities and jurisdiction, as would have been vested in or exercisable by the Court of Chancery, or a judge thereof, in court or at chambers, if all the scheduled and absorbed companies had been in liquidation in the Court of Chancery at the passing of this Act.

It was also suggested that the winding-up order if made, should date from the 12th Jan. 1872, the date of the order to wind-up the European Society. The policies would have to be valued as at the date of the winding-up order, and it was suggested that it might be inconvenient to have the dates of the different winding-up orders so far apart. This is the course laid down by the Life Assurance Companies Act 1872, unless the court otherwise orders: (35 & 36 Vict. c. 41.)

Sect. 4:

Where the business or any part of the business of a life assurance company has, either before or after the passing of this Act, been transferred to another company under an arrangement, in pursuance of which such first-mentioned company (in this Act called the subsidiary company), or the creditors thereof has or have claims against the company, to which such transfer was made (in this Act called the principal company), then, if such principal company is being wound-up by or under the supervision of the court, either at or after the passing of this Act, the court shall (subject as hereinafter mentioned) order the subsidiary company to be wound-up in conjunction with the principal company, and may by the same or any subsequent order appoint the same person to be liquidator for the two companies, and make provision for such other matters, as may seem to the court necessary, with a view to such companies being wound-up as if they were one company, and the commencement of the winding-up of the principal company shall, save as otherwise ordered by the court, be the commencement of the winding-up of the subsidiary company.

W. W. Karslake appeared for Mrs Conquest, and contended that the winding-up order would be made, on the premium being paid, which would have been paid if the Wellington Society had been carrying on business *de facto*, as it had been *de jure*.

Bush appeared for the two directors of the Wellington Society, and contended that the 9th section of the Arbitration Act provided that the society was to continue until the passing of the Act, when it was to be considered as being in process of being wound-up. Thus in the interval between the 21st June 1872, and the 25th July 1872, the policy had dropped, the premium not having been paid to the society, or to their agents, and consequently Mrs. Conquest was not a policy-holder of the society. [Lord WESTBURY.—To whom could she have paid the premium?] She might have paid it into court under the order of Malins, V. C., or she might have tendered it to some of the persons who represented the Wellington Society. [Lord WESTBURY.—There was no order in existence. First there was an order to pay in, and then an order to pay out. I suppose the order to pay out stopped the paying in. The European Society, the agents, could not receive any premiums. The Wellington Society itself disappeared, and the agents, the European Society, became insolvent, and were the subject of a winding-up order. Where could there be any default?] In the circular that was addressed to the policyholders on the occasion of the amalgamation with the British Nation Association (vide *sup.* p. 68), she was directed to pay the premiums to the agent to whom she had been accustomed to pay it, inasmuch as the agents of the Wellington Society would be the agents of the British Nation Association. She ought, therefore, to have paid the premium to this agent.

Montague Cookson appeared for the official liquidators of the European Society.

Lord WESTBURY.—

This lady could not have paid her premiums to any agent of the Wellington Society, nor could she have paid her premiums to the Wellington Society itself. The Wellington Society had ceased to exist, and the other companies had also ceased to exist in a state of solvency. She was directed that if she liked to pay her premium to the agent to whom she had hitherto been accustomed to pay it, she would have authority to do so, as the agent would be the agent of the British Nation Association (*vide sup.* p. 68). That direction might have continuance until the British Nation Association ceased to exist by its union with the European Society. Then the power to pay the European Society would have continuance until the European Society was knocked on the head by the winding-up order; and after that, unless you can show me that there was an office, or a place of business, or a person with capacity to give discharges, which was notorious on the part of the Wellington Society, there could be no default imputed to this lady, and the interval of time that elapsed between the date of the European Assurance Society Arbitration Act 1872, and the time when her former payment expired, namely in May 1872, is a period of time during which she would have sought in vain for a hand competent to receive, and, therefore, it cannot be imputed to her that there was any default in non-payment. I think, therefore, on payment of the premium, she is entitled to have this order to wind-up the Wellington Society. In the case of the old European Company (*Gardiner's case, sup.* p. 63) I decided not to carry back the winding-up order to the date of the order for winding-up the original company, and therefore we must abide by that. The order must bear date from to day. Mr. Beasley and the applicants will have their costs out of the Wellington estate, as well as the joint official liquidator of the European Society, who will have the conduct of the winding-up.

Solicitor for Mrs. Conquest, *J. G. Fox.*

Solicitors for the directors, *Pattison, Wigg,* and *Co.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Tuesday, April 8.

CHARSLEY'S CASE.

Policy—Contract—Improvident contract—Delay in completion of purchase.

Refusal of an application to rescind a contract for the purchase of policies on the ground of delay in completion of the purchase, and of the inadequacy of the purchase-money.

In the winding-up of the European Life Assurance

Society, some policies held by the society in various companies were, in March 1872, *offered for sale by auction by the then official liquidators. C. attended the sale, and bought five of the policies. In April* 1873, *it was contended by the official liquidators, who had since been appointed in the arbitration, that the contract ought to be rescinded, both on the ground of delay in completing the purchase and on the ground that the bargain was a very improvident one; the surrender value of the policies being now found to be much greater than the prices at which they had been sold. With regard to one policy the surrender value being as much as* 617*l.* 8*s.*, *while the purchase-money was only* 50*l.*

Held, that the contract must not be rescinded; inasmuch as there was no ground for alleging that C. had knowledge of circumstances, that ought to have made him pause in entering into the contract with persons whom he must have believed to be either ignorant or culpably negligent in the performance of their duty; and there was no ground for imputing to C. that he must be considered to have abandoned his purchase, or to have delayed it for so long a time as to have produced a measure of inconvenience, for which he ought to suffer, either by the court declining to enforce the contract, or by making him pay something in respect of the delay.

THIS was an application by the present official liquidators of the European Society to rescind a contract that had been entered into by the former official liquidators for the sale of five policies held by the society in various companies.

On the 26th March 1872, the then official liquidators sold by auction a large number of policies held by the society in various insurance companies. Mr. Charsley attended the sale and bought five policies. Certain requisitions had been made by him as to the title of the policies, and the completion of the purchase had been from time to time delayed.

The official liquidators now sought to rescind the contract, both on the ground of delay by Mr. Charsley in completing the purchase, and on the ground of the improvidence of the bargain. For it now appeared that the surrender values of three of the policies, which were granted by the North British and Mercantile Company, were respectively 287*l.*, 617*l.* 8*s.*, and 48*l.* 12*s.* 8*d.*, while the purchase moneys were but 245*l.*, 50*l.*, and 10*l.* respectively; so that the difference between the purchase money and the surrender value of these three policies was as much as 648*l.* 9*s.* 10*d.*

On the occasion of the sale, the then official liquidators had prepared a statement suggesting the reserved prices of the policies, and these reserved prices were for some reason reduced by the chief clerk; the reserved price of the policies whose surrender values were 617*l.* 8*s.*, and 48*l.* 12*s.* 8*d.*, being reduced to 4*l.*, and 4*l.* respectively from 385*l.* and 35*l.*

Montague Cookson appeared for the official liquidators.

Whitehorne, for Mr. Charsley, contended that he had been a *bonâ fide* purchaser in an open auction, knowing nothing, and having no power to know anything, as to how the reserved prices were fixed. With regard to the large difference between the purchase-money of £50 for one of the policies, and the surrender value of £617, there was indorsed on the back of the policy a notice, making the receipt of any money conditional on the payment of another policy, over which Mr. Charsley had not control whatever.

[Lord WESTBURY.—I do not mean to enter into that. The people who contracted with you were signally ignorant or negligent of their duty. You did not know that they were so careless. If you deal with a person who is either trustee or assignee, and you know that that person is failing in common prudence and common care, you shall not retain the benefit of the contract, which you ought to know, as an honest man, should never have been entered into. Mr. Cookson's "equity" is nothing in the world more than his own negligence, and his own abandonment of the duty that he owed to the creditors. Mr. Cookson says that a court of equity will open biddings. I have yet to learn that a court of equity will ever open the biddings at the instance of a vendor, who showed at the time of the application, that if he had used common care and caution, he would have known the existence of that thing on the foundation of which he now applies to have the biddings opened. It is a very unfortunate thing that the creditors should have to suffer for this negligence, and this neglect of duty on the part of those who preceded Mr. Cookson's clients; but I cannot on that account deprive a man of a contract that he makes openly, without any ground or reason to believe that the contract was an imprudent one on the part of the vendors, which vendors happen to fulfil a situation of duty.]

Lord WESTBURY.—

There is no imputation upon Mr. Charsley, but there is a great deal of imputation of gross neglect, indifference and carelessness on the part of the persons who sold to Mr. Charsley. Mr. Charsley openly bought in the market. He had no reason to believe that he bought anything but what was there described. He accordingly entered into the contract, and he is now willing to perform it. The request made to me is that I shall take away from this innocent man that which he has openly and fairly bought, and bring it back to the society, which is represented in this case by careless and delinquent trustees, in order that the persons who have committed the fault may be exonerated from the consequences. I will do no such thing. Mr. Charsley must have the benefit of his contract. It is undoubtedly true that there are cases, where there has been a very improvident sale made by the trustees—so improvident that it is scarcely possible to believe the purchaser, who has the benefit of that improvident contract, could have been unaware of the fact of its being an unwise and improvident contract. There are cases of that nature, in which a court of equity has relieved, but that has been only where there has been, in truth, what I may call complicity; at all events, notice to the purchaser of the circumstance that ought to have made him pause in entering into the contract with a party, whom he must have believed to be either ignorant or culpably negligent in the performance of his duty. I see no reason to impute that to Mr. Charsley. It is a most extraordinary thing—the history of this transaction. It is a fair sample of a great many other transactions of a similar or worse character, in which the interests of creditors and shareholders have been grossly sacrificed by those, whose duty it was to have protected them.

The story they tell of going before the chief clerk, who reduced the reserve biddings in that extraordinary manner, is a thing so incredible that one an hardly give credit to its having occurred in ny matter, except in a matter of a winding-up, where the things done are of such a singular character, that there is nothing so extraordinary as to strike the mind with surprise. There is no ground for imputing to Mr. Charsley that he must be considered to have abandoned this purchase, or to have delayed it for so long a time as to have produced a measure of inconvenience from which he ought to suffer, either by the court declining to enforce the contract, or by making him pay something in respect of the delay. I think the communications were such as to show to Mr. Charsley that the company meant to abide by the contract up to a certain time, until he had the intimation that they intended to get rid of the contract. I think the official liquidators have done right in bringing this matter to my knowledge, and I must direct that the remainder of the purchase-money, after deducting the twenty per cent., be paid within a month by Mr. Charsley, together with interest thereon at four per cent., and under the circumstances I shall make that order without giving Mr. Charsley any costs of this application. The other party will take his costs out of the estate.

Montague Cookson.—I see according to the condition of the contract the interest is to be five per cent.

Solicitor for Mr. Charsley, *W. Charsley.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

END OF THE THIRD SITTINGS.

THE

EUROPEAN ASSURANCE ARBITRATION.

(BEFORE LORD WESTBURY.)

FOURTH SITTINGS.

REPORTED BY R. MARRACK, ESQ., BARRISTER-AT-LAW.

Thursday, June 19.

WALTON WILLIAMS'S CASE.

Company—Winding-up—Contributory—Bonâ fide transfer — Misdescription of transferee—Gentleman—Mis-statement of consideration—Transfer set aside and transferor placed on the list of contributories.

Where a man has shares in a company, being a common law partnership, and wishes to dispose of them to A. B., and knows very well at the time that A. B., is insolvent, or dishonest, or a most improper man, for some reason or other, to be introduced into the partnership, then that personal knowledge forbids him to transfer the shares, and his persisting in doing so, relying upon the ignorance of the directors and concealing what he knows is a fraud upon the directors; and in the event of the company being shortly afterwards wound-up, the transferor is liable to be placed on the list of contributories in respect of the shares.

It is wholly immaterial whether there was any misrepresentation or not, or whether the directors inquired or not.

Thus, where W. sent a notice to the European Company of his wish to transfer 1000 *shares to "G., gentleman," in consideration of* 5*l.; and the proposed transferee was approved of and the transfer was subsequently executed and registered; and it afterwards appeared that the transaction had been this: W. had gone to a dealer in shares, who had found out G., the proposed transferee, and had induced him to execute the transfer of shares in consideration of receiving* 2*l.* 16*s., G. being a retired coach proprietor and driver, blind and wholly without means—in the winding-up it was*

Held, that W., the transferor, must be placed on the list of contributories in respect of the shares.

THIS was an application to place the name of Mr. Walton Williams on the list of contributories to the European Assurance Society.

It was provided in the society's deed of settlement that a shareholder who wished to transfer his shares should send to the society a notice of his wish, and should describe in the notice "the full name, and profession or calling, and place of abode of the proposed shareholder;" and on the approval of the proposed shareholder by the directors, he might transfer his shares: (clause 96; *vide sup.*, p. 11.)

In May 1870, Mr. Williams held 1000 shares in the European Assurance Society; and on the 13th May 1870, he sent to the society a formal notice of a wish to transfer the shares to "George Gilbert, of 135, Stamford-street, Blackfriars, Gentleman," in consideration of £5. On the 16th May 1870, the manager of the society wrote to him as follows:—

Dear Sir,—With reference to the notice of transfer of 1000 shares standing in your name, I beg to inform you that the transfer can be completed to-morrow, on the calls due being paid.

HY. B. PARMINTER, Manager.

Wm. W. Williams, Esq.

On the 19th May 1870, a formal deed of transfer was executed by Mr. Williams and by Mr. Gilbert, whereby the 1000 shares were transferred by Mr. Williams to Mr. Gilbert in consideration of £5. This transfer was forwarded to the society, and on the 24th May the secretary sent certificates for the shares to Mr. Gilbert through a Mr. Bensusan.

It now appeared that the transactions with reference to the transfer were these: Mr. Gilbert, the transferee, had formerly been a coach proprietor and driver; but, having become blind, was in 1870 wholly without means and without occupation. He had been asked by a Mr. Bensusan—a dealer in shares, but not a sworn broker—to sign several transfers of shares in consideration of receiving a few pounds on each occasion. Mr. Gilbert had not known Mr. Williams, the transferor, but had executed the transfer at Mr. Bensusan's request, and instead of paying 5*l.* for the shares, had received 2*l.* 16*s.* for putting his name to the transfer. He had not entered into any previous contract with Mr. Williams for the purchase of the shares.

In the winding-up of the European Society Mr. Gilbert's name was found on the register as the holder of the 1000 shares.

The official liquidators now contended that the financial condition of the society had been well known to Mr. Williams to be a very doubtful one, and that the transfer to Mr. Gilbert had been contrived by Mr. Williams and Mr. Bensusan, with a view of enabling Mr. Williams to get rid of his liability; that, in fact, the transaction was not a *bonâ fide* one, but was carried out in bad faith to the creditors of the society and the other proprietors of shares; and that, accordingly, Mr. Williams ought to be placed on the list of contributories in respect of the shares.

Napier Higgins, Q.C. and *Montague Cookson* appeared for the official liquidators.

Langworthy for Mr. Williams.—The transfer was an absolute transfer: the transferor did not retain any interest. With regard to the representation made by him to the society, there was not such an amount of misrepresentation as to induce the directors to accept the transferee. The vague term of gentleman was not altogether an inaccurate description of the transferee. At any

rate it was not sufficient to vitiate the transaction *Master's case* (L. Rep. 7 Ch. 292). [Lord WESTBURY. —I may tell you that I do not attach the smallest weight to his being called a gentleman. I do not think the case turns upon misdescription at all, but upon other considerations.] With regard to the consideration being misstated, the deed of settlement did not require the consideration to be communicated; the amount of the consideration is wholly immaterial. Moreover, the 5*l.* was actually paid to Mr. Williams, and he has sworn that he believed that to be the true consideration.

Lord WESTBURY,—

I am very sorry he has done so. It is surprising to me that transactions of this kind, that bear their real character stamped upon their face, should be attempted to be so gilded and varnished as to impose upon the minds of plain honest men, and to induce them to believe that the thing is something else than what it is in reality plainly observed to be by anyone, who will not allow his eyes to be wilfully closed to the truth. Now I mean to insist upon the rule applicable to these cases, which perhaps has not hitherto been quite observed, and I will state my reason for bringing that forward as my rule of decision; and unquestionably I shall adhere to it, believing it to be rightly founded in equity, and most necessary for the preservation of true moral conduct as between man and man. Now, originally, before the statute, we know in common law partnerships that the shares of the partners did not admit of being transferred to an individual not being a member of the partnership. The Legislature thought it right to alter the law in that respect, and accordingly it did make a general enactment, giving liberty to parties who had shares in a partnership to transfer those shares; but then it qualified that power by very stringent provisions, which were intended to protect the other partners from being imposed upon by the introduction of paupers and unqualified and improper persons, and also intended to protect the public from having the name of a solvent and qualified individual withdrawn and another person substituted for that name, who had none of those qualifications. Now, what it required was this, that the partner desirous of transferring his shares should make a representation to the directors of the company, and that that representation should involve a statement of the position of the individual transferee, whom he desired should be substituted in lieu of himself as the owner of his shares. Now, the object of that provision is plain, it was plainly intended to preserve the company from imposition, it was plainly intended to prohibit the introduction of improper persons; but besides this rule of conduct, the things that were required to be done—taken as we are in the habit of doing in equity, abstractedly from the form of the prohibition—amount to a real engagement between the parties, that the man who desires to retire should not attempt to effect that object in any manner that would be detrimental to his co-partners. It became therefore as much a rule of conduct to be observed by the retiring partner, as it became a rule prescribing the formalities requisite to be observed by the partner who desired to part with his shares. It is material to notice that, because in many of these cases the partner wishing to sell believes himself quite at liberty to sell when he has to the letter observed the forms required, and if it so happens that the directors have not required of him distinctly what they might have required, he has deemed himself at liberty to disregard the obligation upon him, and to get rid of his shares, if he could do so, although he was perhaps perfectly well aware that his disponee was a very improper person to be incorporated into the partnership and become a partner with his brother shareholders. Now I mean to regard these cases in this light. I do not care a rush whether the directors inquired or not, or whether there was misrepresentation or not; but if I find the man who desires to dispose of his shares in favour of A. B., knows very well in his mind at that time that A. B. was an insolvent man, or a dishonest man, or a most improper man, for some reason or other, to be introduced into the partnership, I shall hold that that personal knowledge on the part of the individual disposing of his shares forbade him to do what he desired to do, and that his persisting in doing it, relying upon the ignorance of the directors, and concealing what he knew was a fraud upon the directors. Now I mean to treat Mr. Williams precisely by that rule. Is he in that situation that I must impute to him knowledge of the circumstances with regard to Mr. Gilbert which Mr. Bensusan knew? If so, those circumstances were such as rendered it very improper and very wrong that Mr. Williams should send in the name of Gilbert, the pauper, with in reality a recommendation that he should be admitted into the books of the partnership as a partner. Now, if you will judge these cases by that light, a great number of things which are argued about, but which are in reality immaterial, may be entirely dropped out of consideration. If the assignor knows that his representation is one calculated to deceive, is one that does not convey to the directors what it was important for them to know, which the asssignor knows, but which he does not tell them, he shall get no benefit, as far as I am concerned, from the transaction. The transaction shall be examined and discussed with reference to what would have been the case, if the gentleman, instead of concealing what he has concealed, had faithfully and openly narrated to the directors all that he knew with regard to the proposed assignee.

Now, the steps for disposing of this case are these: First of all was Mr. Bensusan in this transaction of the assignment in any sense or way the agent of Mr. Williams? Undoubtedly he was. Mr. Williams goes down to Mr. Bensusan; something takes place between them, by virtue of which Mr. Bensusan actually sells Mr. Williams's shares, and Mr. Williams does not complain of that transaction, but adopts it. Mr. Bensusan found out the purchaser, and approved of him, and sold the shares to him. Well now, what was the condition of the purchaser? He was a man steeped in poverty, not only poor to the very dregs, but unfortunately visited with an infirmity that left him no hope of being able to rise and attain to a better state in life. He was so poor that he was indifferent about the transaction. He is represented upon the face of the transaction as paying 5*l.* It does not appear that he was a party to that falsehood. Mr. Williams knew that that was the representation. and he knew that it was false. Mr. Bensusan knew that it was a misrepresentation, and he also knew that it was false. We find the

agent of Mr. Williams selecting a purchaser in order to accomplish the object of Mr. Williams, clothing that purchaser with the character of being a person of some means, or at least a person that could command some little money, so as to give the transaction the character of a *bona fide* sale, instead of its being a transfer of liability only, and of nothing like property, with a bribe to the transferee of 2*l.* 16*s.* to accept that liability. Can Mr. Williams stand in this room and tell me that it was a proper thing to do to take 1000 shares on which there were still calls to be made, involving a great liability, and to go down and pick out a pauper to manipulate the whole matter through the agency of Mr. Bensusan, who carries it out in the best possible manner—that manner however being at variance with the truth. And here Mr. Williams comes into a court of justice, and in reality tells me this:—"I verily believe that, if the directors had known the truth, and had known who Mr. Gilbert was, had known the manner in which he had been brought upon the stage, if they had known the misrepresentations throughout the whole of this transaction, still they would not have been deterred, and ought not to have been deterred, from putting Mr. Gilbert upon the list of shareholders." Now does anybody believe that? Is there any gentleman in this room, that believes that the directors with full knowledge of these circumstances, would have been bound to put Mr. Gilbert upon the list of shareholders? For it is not merely what they might have done, but it is what they might have been justly and rightly required to do. If giving them the knowledge that Mr. Williams had, you can still say it was their duty to have put Mr. Gilbert upon the list, then I admit that the transaction is one that must pass muster. But it is no such thing; it is plain to everybody that there was a studied desire and attempt by false statements to conceal the truth; it is plain to everybody that, if the truth had been known, the directors would have committed a grievous error in putting Mr. Gilbert upon the list of shareholders. It is perfectly clear to my mind that Mr. Williams, if it were a case of another kind, would have been the first to have complained of it; and, therefore, by that I try the case, and I hold that it was an improper transaction to attempt to smuggle Gilbert, a confirmed pauper, on to the list of shareholders, and that the transaction ought to be condemned and ought to fail; and Mr. Williams must pay the costs of it. Now I hope these principles will be recollected; for I see we shall have a great many of these transfers, and I can see that many persons may attempt to escape by adhering to the letter, and not entering into what ought to be the spirit, of the rule to be taken therefrom, but I shall try it by that rule of honesty, and where it does not answer that rule, I shall condemn the party by annulling the whole attempt, and by making him pay all the costs. Of course Mr. Williams will be restored to his former position on the list. You will erase Mr. Gilbert's name, and restore Mr. Williams to his former position as shareholder upon the list; and let Mr. Williams pay all the costs of and incidental to the case.

Solicitors for Mr. Williams, *Boulton* and *Sons*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

Wednesday, June 18.

BURNS'S CASE.

Life Assurance Company—Amalgamation of companies — Winding-up — Annuity — Novation of contract—Advertisement of winding-up order—Annuitant held in 1873, *after an amalgamation in* 1860, *to be a creditor of the old company as well as of the new, notwithstanding an advertisement in* 1862 *of an order to wind-up the old company.*

In January 1860 *an annuity contract was granted to B. by the W. Assurance Association. In Oct.* 1860 *this association transferred its business to the B. N. Association; and on the* 14*th June* 1862 *an order was made by the Court of Chancery on the petition of a creditor that the W. Association be dissolved, as from that day, and be wound-up.*

In July 1862 *an advertisement was inserted in various newspapers, calling on creditors to come in and prove their debts. From* 1860 *to* 1862 *the annuity was paid by the W. Association, and receipts were given to that association. From* 1862 *to* 1865 *it was paid by the B. N. Association and receipts given to that association. In* 1862 *the business of the B. N. Association was transferred to the E. Society, who subsequently paid the annuity, and to whom receipts were given by the annuitant. In the winding-up in* 1871-3, *the annuitant claimed on his policy against the W. Association.*

The claim was opposed by the official liquidator on the ground that knowledge of the winding-up of the W. Association in 1862 *must be imputed to the annuitant, and that after dealing with the other companies for twelve years she could not turn round and claim against the W. Association.*

Held, that the annuitant was entitled to her claim.

Hemming appeared for the Misses Burn.

Napier Higgins, Q.C. and *Montague Cookson* for the official liquidator, referred to

Puddicombe's case (*sup.* p. 66); and
Carpmael's case (*sup.* p. 95).

Lord WESTBURY.—I never met with anything more reasonably clear. These two ladies were grantees of annuities, which they bought from the English Widows' Association. The English Widows' Association, after those contracts, assigned their business to the British Nation Association. The terms upon which they assigned were perfectly clear: the business of the English Widows' Association became the property of the British Nation Association. The British Nation Association took over all the contracts, and, according to this case, all the liabilities, of the English Widows' Association, and they engaged to keep down and to meet those liabilities. Whether the two annuitants were parties to that is not alleged, or whether they knew anything at all about it. The receipts appear to have been given in the old name and in the old manner. But it is perfectly immaterial whether they did or did not. They remained creditors of the English Widows' Association. Pursuant to the arrangement between the English Widows' Association and the British Nation Association, they received their annuities regularly from the hands of the British Nation Association, and in doing so they acted in pursuance of the contract which had been made between the two companies, and took from the assignee company

what, by arrangement with the grantor company, the assignee company was to pay. After this had gone on for some time, somebody applied to the Court of Chancery for an order to wind-up the original grantor company, namely, the English Widows' Asscciation, and they got that order. That did not at all disturb the proceeding they had commenced under the contract between the two companies, nor did it at all disturb the receipt of their annuities by the annuitants. The annuitants took annuities from the source which they were directed to apply to, namely, the British Nation Association paid them for and on behalf of the English Widows' Association, pursuant to the engagement which they had themselves made with the English Widows' Association. What default is to be imputed to these ladies? What obligation was there upon them to go in and prove under the order for winding-up the English Widows' Association? They had nothing to complain of whilst the annuities were paid to them. They had no reason to apply under the order, whilst they duly received their annuities pursuant to the arrangement that had been made. In that state of things, I have this monstrous suggestion made on the face of this case: "under the circumstances aforesaid" (the "circumstances aforesaid" being the due and regular payment of these annuities pursuant to the contract between the two companies) "the joint official liquidators contend that the said Eleanor Burn and Jane Burn are barred by laches, acquiescence, and lapse of time." Now, how in the world laches can be imputed to a claimant who is in regular reception of his claim, is something which has occurred to the joint official liquidators, but I think I may say never occurred to anybody else. Laches might be imputed, if there was any obligation upon them to prove their debt for the benefit of other parties. But the amusing part of this matter is, that the joint official liquidator, acting on behalf of and representing the English Widows' Association, imputes laches to his own creditor, who had regularly prosecuted and received his debt pursuant to the arrangement that was made between the English Widows' Association and the British Nation Association. Well now we come to another term which has been used here—"acquiescence." Acquiescence in what? Acquiescence in the due receipt of the annuity. Is not that the first time that acquiescence in having received all that you are entitled to, is to be used as an argument against you? And "lapse of time" forsooth. Can there be any lapse of time when, during the whole time that has elapsed, the individual claimant has received all that he was entitled to. I never saw words so misused, and I never saw anything that was marked with such an entire confusion of thought, as to suppose that a creditor who has duly received his money pursuant to the direction of the debtor, has lost his claim against that debtor by the very fact of the due receipt of the money. There is no ground whatever for imputing anything of the kind. It is true that if a dividend had been declared of the English Widows' Association's estate by the Court of Chancery under the winding-up order, that dividend might have been confined to the benefit of those who had gone in and proved under that order, and therefore these annuitants might have lost the benefit of that dividend by reason of not having gone in and proved. But in reality, there was nothing for them to do, because it was regularly paid from another creditor, namely, the person who had received valuable consideration from the English Widows' Association for engaging to pay it, and who had regularly paid it by virtue of that engagement. Now in the lapse of time it became material that the annuitants, having been deprived probably of the additional security, should resort to and enforce the original security. And having kept alive the additional security and claimed the benefit of that engagement involves the keeping alive and the claiming the benefit of the original engagement. I am sorry to see money wasted over such a total misapprehension of facts as is involved in this case. There can be no doubt that there has been nothing like novation. There can be no doubt that there has been nothing like the loss of the remedy by neglect or loss of time. There can be no doubt that as often as the annuitants received money from the British Nation Association, who paid by virtue of their agreement with the English Widows' Association, they did in reality receive that money from the English Widows' Association. The forbearing to carry in a claim for the value of the annuity under the order to wind-up the English Widows' Association was in my opinion a wise proceeding; for if they had once proved for the value of the annuity, it might admit of considerable doubt whether, regard being had to the maxim that proof is payment, they would be at liberty to prosecute and demand the payments from the additional debtor, namely, the British Nation Association. I think, therefore, these ladies are clearly entitled to all their securities; they are entitled now to resort to the original grantors; they are entitled to maintain the liability of the British Nation Association, which contracted to that effect with the original grantor. Upon that ground therefore, they must be entitled to the order they now ask, and they must have the costs of this application.

Hemming.—I do not know whether the form of the order is, that they are to have the option to prove against either company.

Lord WESTBURY—Why should they not prove against both? If there be no authority for it, what is better than authority is, there is reason and principle. The European Society represent the British Nation Association. The English Widows' Association are the original debtors. The European Society was added to the security of the annuitants. In the language of that, which it is pedantry to refer to—those maxims that I derive from the civil law, and have repeated too frequently—the liability of the British Nation Association was a cumulated security, an additional security that has devolved on the European Society. My declaration, therefore, is, that they are entitled to prove against both, and to have the benefit of that proof until they have received twenty shillings in the pound.

Napier Higgins.—The next case involves that question. (*Harman's case, vide infra* p. 129.) Upon that question your Lordship will have to consider what the effect of the contracts between the several companies really may be. Will the amount of proof here be only the value of the annuity at the date of the winding-up order?

Lord WESTBURY.—We must decide that question when we see the materials. All we pronounce is in the abstract. I propose, unless the arguments in the case, that we are now approaching,

show me that I am wrong, to declare that these ladies are entitled to prove against both companies, and that they hold the security of both, and that the one has not been substituted for the other.

Hemming.—The British Nation Association is also within your Lordship's jurisdiction, so that the declaration will extend to all three.

Lord WESTBURY.—No; the European Society takes by devolution.

Napier Higgins.—The question of the basis of value cannot be determined now. Mr. Mercer is anxious to know what he is to do as to the proof brought in.

Lord WESTBURY.—We will reserve the question if you like. As to the nature and form of such proof, there may be liberty to apply. The costs of all parties will come out of the English Widows' Association estate.

Solicitor for the Misses Burn, *J. Burn.*

Solicitors for the official liquidators, *Mercer* and *Mercer.*

Wednesday, June 18.

HARMAN'S CASE; PRATT'S CASE.

Life assurance company—Amalgamation of companies — Winding-up—Novation of contract—Policyholder entitled to concurrent proof against each of several amalgamated companies.

Where there are four insurance companies, A., B., C., and D., and each of the companies A., B., and C. has made a transfer of its business, A. to B., B. to C., and C. to D., and each of the three transferee companies admits that it is liable on a policy of life assurance granted by the original company A., then in the winding-up of the four companies the policyholder is entitled to prove for the full amount of the claim on his policy against each of the companies concurrently—subject to the limitation of not receiving more than 20s. in the pound.

IN 1856 the Anglo-Australian and Universal Family Life Assurance Company granted a policy for 200*l.* to Mr. Harman on his own life, and another for 100*l.* to Mr. Pratt on his life. In 1858 an amalgamation was effected between the Anglo-Australian, &c., Company, and the British Provident Life and Fire Assurance Society, by means of a deed dated the 1st June 1858, whereby the business, property, liabilities, and engagements of the Anglo-Australian Company were transferred to and undertaken by the British Provident Society, without its being necessary to the establishing by the holders thereof of their claims (if any) payable thereunder, that the policies or grants of the said Anglo-Australian Company should be indorsed by or on behalf of the British Provident Society, or that new policies or grants should be issued in lieu thereof, unless the holders thereof should require the same, in which case it was thereby declared that the holders of such policies or grants of annuities should determine which, or either, or if both of the methods therein described for the transfer to or assumption by the British Provident Society of these policies or grants of annuities should be made or effectuated. And the deed further provided that the premiums for the renewal of the policies and grants of annuities (if any) thereafter to become due, should be paid and payable only to the British Provident Society, who should cause the necessary receipts and discharges to be delivered for the same.

In July 1858 Mr. Harman made an application to the British Provident Society, in consequence of which Mr. Sheridan, the managing director of that society, wrote him the following letter:

8th July, 1858.

Dear Sir,—I forward you the enclosed guarantee to annex to the policy you hold of the late Anglo-Australian Company. JOHN SHERIDAN, Managing Director.

Inclosed in this letter was the following:

Anglo-Australian Policy, No. 829. British Provident Policy. No. 3399.

British Provident Life and Fire Assurance Society, with which is incorporated the Anglo-Australian and Universal Family Life Assurance Society.

Chief Office, 4, Chatham-place, Blackfriars, London, E.C.

Whereas George Harman, of No. 32, North-street, Lewes, in the county of Sussex, builder, did, by a policy numbered 829, and dated the 29th Feb. 1856, effect an assurance upon his own life with the Anglo-Australian and Universal Family Life Assurance Company for the sum of 200*l.*

And whereas the said Anglo-Australian and Universal Family Life Assurance Company, being desirous that the said assured should have the additional guarantee of the British Provident Life and Fire Assurance Society, the said British Provident Life and Fire Assurance Society do hereby at the instance and request of the said Anglo-Australian and Universal Family Life Assurance Company agree to assure the said George Harman on the terms and in manner set forth in the said policy and on the conditions endorsed thereon. In witness, &c.

JAS. GOAD,
ED. GRIFFITHS,
JNO. JONES.

24th June 1858.

Mr. Pratt, the holder of the other policy, did not have it indorsed by the British Provident Society, nor did he require a new policy to be issued in lieu thereof.

In 1859 the British Provident Society transferred its business to the British Nation Association. The agreement for transfer was dated the 8th March 1859, and it was thereby agreed that the life assurance, &c., business of the British Provident Society, and all premiums and payments to accrue and be made thereon, together with the goodwill of the business, should be assigned and transferred to the British Nation Association, as and from the 31st March 1859, and that thereupon the British Provident Society should cease to carry on the business of life assurance, &c. This agreement was duly confirmed by general meetings of the society and the association respectively, and the transfer to the association of the business of the society was perfected accordingly, the association undertaking all such risks, liabilities, and engagements of the society, incidental to the business, as were in force on the 31st March 1859.

On the 6th March 1861, an order was made by the Court of Chancery on a petition, presented by a shareholder on the 14th Nov. 1859, that the British Provident Society should be absolutely dissolved as from the day of the order, and wound-up by the court.

The following advertisement was published in the *London Gazette*, the *Times*, and other newspapers, in March and April 1861:

In the matter of the Joint Stock Companies Winding-up Acts 1848 and 1849, and of the Joint Stock Companies Winding-up Amendment Act 1857, and of the British Provident Life and Fire Assurance Society (Registered).

All parties claiming to be creditors of the society are to come in and prove their debts before his Honour the Vice-Chancellor Sir Richard Torin Kindersley, the judge charged with the winding-up of the said society, at his chambers, No. 3, Stone-buildings, Lincoln's-inn, Middlesex, and until they shall have so come in, they will be

precluded from commencing or prosecuting any proceedings for recovery of their debts. And notice is herdby further given that his Honour has appointed Monday the 22nd April 1861 at 12 o'clock at noon at his chambers situate as aforesaid for hearing and adjudicating upon the claims.

At this time Mr. Harman was carrying on business at Lewes as a builder, and Mr. Pratt at Woburn as a paper manufacturer. They neither of them carried in any claim in respect of their policies in this winding-up of the British Provident Society.

In March 1861 the British Nation Association sent the following circular to Mr. Pratt and to Mr. Harman. It was addressed to the policyholders of the Anglo-Australian Company and the British Provident Society:

The winding-up of the British Provident Society:—It is perhaps here desirable for me to remind you that your policy though coming to this office from the British Provident is now fully guaranteed by this association, and that on taking over the business of the British Provident Society, this association took none of its other liabilities, nor is the British Nation Association in any way implicated in the affairs of the British Provident. Whether, therefore, as I have before explained, that society is wound-up in the Court of Chancery, or by its own directors, this association is not affected by it.

I think there are few of the British Provident policies, which have not already been indorsed by the directors of this association; should there be any such, if the assured will send them to this office, they will be at once guaranteed and sealed. I mention this at this time, lest any of the assured might feel any alarm at reading the reports in the newspapers respecting the winding-up of the British Provident Society, but it is also my duty, in order to save trouble to the assured, to remind them that their policies are just as secure and as much recognised by this Association without the indorsement as with it.

Mr. Harman did not send in his policy for indorsement, but Mr. Pratt's policy was sent to the British Nation Association, and was returned with the following indorsement on it:

In consideration of the within-named assured having agreed to the transfer of the within-written policy to the British Nation Life Assurance Association, and to pay to the said association all future premiums on the same policy as they become due, and to observe and perform all the stipulations contained in the said policy on the part of the assured, the said association doth hereby agree to observe and perform all the stipulations contained in the said policy on the part of the British Provident Life and Fire Assurance Society, and in the stead of the said society. Provided always that this policy shall be subject to the provisions of the deed or deeds of settlement of the British Nation Life Assurance Association, and that the subscribed capital for the time being of the said association, and other the funds and property of the said association, remaining at the time of any claims made, undisposed of and inapplicable to prior claims in pursuance of the provisions of the deed or deeds of settlement of the said association, shall alone be liable to answer all claims of the said association in respect of this policy and of all other policies, and that no director or other proprietor of the said association, his heirs, executors, and administrators shall by reason of any policy of assurance or guarantee and instruments securing an annuity or annuities, or the whole of the policies of assurance and guarantees, or instruments securing annuities taken together, which any directors or director have or hath signed or may sign, or upon that or any other account be in anywise individually liable to any claims against the said association beyond the amount of the unpaid part (if any) of his particular share or shares in the subscribed capital of the said association.

In witness, &c.

R. WALLIN JONES, S. SMITH, G. C. RICHARDSON. } Directors of the British Nation Life Aesurance Association.

16th Feb. 1865. HENRY LAKE, Manager.

In 1865 the British Nation Association transferred its business to the European Assurance Society.

The premiums on the policies were paid in succession to the Anglo-Australian Company, the British Provident Society, the British Nation Association, and the European Society.

The forms of the receipts from time to time were as follows:

RECEIPT for 1858.

Anglo-Australian and Universal Family Life Assurance Company, London Offices, 5, Cannon Street, W., City.

Premium receipt, No. 1023.

Policy, No. 829.

Received this of , 1857, from Mr. George Harman, the sum of 5*l.* 10*s.* 10*d.* as premium for renewal of an assurance of 200*l.* on the life of himself, up to and including the 22nd Feb. 1858.

JOHN NEWTON, Secretary.

RECEIPT for 1859.

British Provident Life and Fire Assurance Company (with which is united the Anglo-Australian Assurance Company).

4, Chatham-place, Blackfriars, London.

Policy, No. 3397. Sum assured, 200*l.*

12th March 1859.

Received of Mr. G. Harman the sum of 5*l.* 10*s.* 10*d.*, being the payment of yearly premium from the 22nd Feb. 1859, to the 21st Feb. 1860, for an assurance of the sum of 200*l.* on the life of himself, effected by the before-named policy with the above-named company.

H. W. KNIGHT, Jun., Managing Director.

RECEIPT for 1860.

British Provident Life Assurance Society and Anglo-Australian Assurance Association, Business united with the British Nation Life Assurance Association.

291, Regent-street, London.

Receipt No. 2756. Sum assured 200*l.*

Policy No. 3399. 5th March 1860.

Received of Mr. G. Harman the sum of 5*l.* 10*s.* 10*d.*, being the payment of yearly premium from the 22nd Feb. 1860, to the 21st Feb. 1861, for an assurance of the sum of 200*l.* on the life of himself effected by the before-named policy.

Yearly premium 5*l.* 10*s.* 10*d.*

HENRY LAKE, Manager and Secretary.

RECEIPTS for 1861-65.

British Nation Life Assurance Association.

Chief Offices, 291, Regent-street, London, W.

Receipt No. 6286. Sum assured 200*l.*

Policy No. 3399. 5th March 1861.

Received of Mr. G. Harman the sum of 5*l.* 10*s.* 10*d.*, being the payment of yearly premium from the 22nd Feb. 1861, to the 21st Feb. 1862, for an assurance of the sum of 200*l.* on the life of himself, effected by the before-named policy.

5*l.* 10*s.* 10*d.* HENRY LAKE, Manager.

RECEIPTS for 1866-8.

British Nation Life Assurance Association in Union with the European Assurance Society, empowered by Special Act of Parliament.

Chief Office, 316, Regent-street, London.

Receipt No. 1485 B. Sum assured, 200*l.*

Policy No. 3399.

Received this 2nd March, 1866, the sum of 5*l.* 10*s.* 10*d.*, being the payment of twelve months' premium, from 22nd Feb. 1866, for an assurance on the life of George Harman, effected by the before-named policy.

JN. HEDGINS. } Directors.

Printed receipts for renewal premiums from the chief office will alone be admitted as valid.

RECEIPTS for 1869-70.

European Assurance Society, empowered by Special Act of Parliament.

Chief office, No. 17, Waterloo-place, Pall-mall, London, S.W.

Premium 5*l.* 10*s.* 10*d.* On the life of G. Harman.

Received the 27th Feb. 1869, the sum above stated, being the amount of premium for the renewal of Policy No.

829, for twelve months from the 22nd Feb. 1869, according to the tenour of the said policy.

MICHAEL QUIN. } Directors.

Printed receipts for renewal premiums issued from the chief office, and signed by two directors will be alone admitted as valid.

The point in question was as to the rights of proof of Mr. Harman and of Mr. Pratt respectively against the several companies in the winding-up, and whether such proof should be concurrent or successive in each case, or in what other manner it should be carried in.

No order had been made for winding-up the Anglo-Australian Company; but Mr. Harman claimed to be entitled to prove on his policy against that company, and also to prove afterwards or concurrently against the British Provident Society, the British Nation Association, and the European Society, successively or together, for the value of his policy, or so much thereof as the assets of the Anglo-Australian Company should be insufficient to satisfy. And Mr. Pratt also claimed to prove concurrently against all the companies until he should have received 20*s.* in the pound.

The official liquidators did not dispute Mr. Harman's right to rank as a creditor of the Anglo-Australian Company, but they contended that the British Provident Society, the British Nation Association, and the European Society were at most guarantors of the liabilities of the Anglo-Australian Company, and that no proof could be carried in against them until the assets of the Anglo-Australian Company should be first exhausted.

The official liquidators further insisted that neither Mr. Harman nor Mr. Pratt took any rights of concurrent proof against any of the companies, and that each company must be resorted to in the order in which it became liable upon the respective policies, and that any other arrangement would be inconsistent with the legal position, and would cause endless trouble and confusion in the winding-up.

The official liquidators also submitted whether Mr. Pratt had not entered into a new contract with the British Nation Association, by virtue of the contract indorsed by that association upon the policy granted to him in the Anglo-Australian Company, and so lost his right of proof against the assets of the Anglo-Australian Company or the British Provident Society.

The official liquidators further submitted whether Mr. Harman and Mr. Pratt, having regard to the proceedings taken in the winding-up of the British Provident Society, and the lapse of time, could be deemed to have had any right of proof against the British Provident Society.

Bagshawe, for Mr. Harman and for Mr. Pratt.—Each of the four companies became liable to each of these two policyholders, and none of the transactions were such as to liberate any company from its liability. If either of the policies had ripened into a claim, the policyholder might have brought an action at once against all four companies concurrently. Where there would be a concurrent right of action, there ought to be a concurrent right of proof:

Re Joint Stock Discount Company, Warrant Finance Company's case, L. Rep. 5 Ch. 86;
Re Barned's Banking Company, Kellock's case, L. Rep. 3 Ch. 769.

Napier Higgins, Q.C. and *Montague Cookson*, for the official liquidators.—There is no right of concurrent proof; the policyholder must prove against such company as he is entitled to prove against primarily as the principal debtor; he may have rights over under guarantees of indemnity, but these cannot be determined until the right against the principal debtor has been exhausted. *Kellock's* case and the *Warrant Finance Company's* case do not apply here, inasmuch as those decisions were founded on special provisions in the Winding-up Act of 1862. The rule in bankruptcy is different, and is more equitable; in bankruptcy a creditor holding a security must value his security and prove for the difference between the value and his debt against the secondary debtor. With regard to Mr. Pratt's policy, the indorsement clearly effected a novation, releasing the original company. And as to Mr. Harman's policy, it is not at all clear that he has any rights against any other companies than the Anglo-Australian Company.

Lord WESTBURY:—

I want attention paid to the remarks that I shall make, and if it is supposed that they miss the point of the case, or that there is any obscurity in them, I shall be very glad to have the case reheard. Now it arises in a very simple form; there is a holder of a policy for 100*l.* granted by the Anglo-Australian Company. That policy is in full force. The Anglo-Australian Company has not been ordered to be wound-up. The Anglo-Australian Company entered into a contract with the British Provident Society to transfer its business and its liabilities to that society. The British Provident Society, therefore, would usurp the place of the Anglo-Australian Company. But the usurpation of the place of the Anglo-Australian Company, with regard to the creditor, would not at all interfere with the right of the creditor. The right of the creditor is that, unless he has accepted the substituted company in discharge of the original company, he retains all his remedies intact against the original company. Now in that state of things, the company who bought from the Anglo-Australian Company becomes bankrupt. Between that company and the original policyholder there is no other relation than this, that the purchasing company bound itself to the Anglo-Australian Company to indemnify the Anglo-Australian Company against all liability. Now if the Anglo-Australian Company became bankrupt, the shareholder would have one proof and one proof only, namely against the Anglo-Australian Company, but the Anglo-Australian Company would have a right of proof, if it paid the debt against the other company. Well, but in the state of things in which we now stand, we have a variety of these transfers from one to the other, and three different transferee companies admit that they are all liable to the original creditor. If, therefore, in a case in which the grantor is liable, and several other persons are liable in aid of the grantee, and all become bankrupt, what is the creditor to do? He has a right to do this: to enforce the full benefit of his security and their liability against all. How is he to do it? Mr. Bagshawe says he must do it by concurrent proof; that is by proof at one and the same period of time. The proof will be controlled, but it will not be prosecuted beyond the extremity of the right of the creditor proving. The result of that right is the receipt of 20*s.* in the pound. The contract is one, and try it by this test—although one security was

given to him in April 1870, another in April 1871, and another in April 1872, yet might he not, when they were all capable of being enforced, bring four actions on them? Undoubtedly he might. If he could bring four actions on them, he might have four proofs. If he brought four actions, who should restrain him? There is the present liability of the present contract; he resorts to it, and brings his action. In like manner there is here a present liability and a present right of proof; he resorts to his right of proof and his four concurrent proofs on the file, in order that he may obtain the receipt of his debt. I see no difficulty in the whole of that. I think that would be a common mode of proceeding. Let this be granted: assuming that you have got four engagements, each of which has ripened into a liability, that is on each of which an action might be brought, cannot you bring four actions on them at one and the same time? Certainly. It is here stated that the original company and the successive transferee companies are all liable to the debtor, inasmuch as the creditor's policy is sufficiently guaranteed by the company. That being so, I think the creditor has a full right of proof on them all *instanter*, and that the only result of that is, that he must account for what he receives under each proof, and that he cannot receive more than 20*s.* in the pound. Then the other point that was raised by Mr. Higgins is this: nay, it was not a guarantee, it was not an association of the second company with the first in the burthen that the first had to bear, but it was a substitution of the second company for the first; and he founds himself upon those innocuous words, that the second company is to be bound instead of the original; and he founds himself also on that slight expression that the assets of the second company are alone to be answerable; he puts it, therefore, that it is a case of substitution and not a case of additional liability or guarantee. Now I have again and again stated that I will not be misled by this term *novation*; that I will not pay any attention to it, unless the parties can show me that there was an express contract to substitute the second company instead of the first, and that the parties entered into that contract knowingly and advisedly, and that they entered into the contract that the second should bear the burden, and not only bear it as well as the first, but that they should bear it to the exclusion of the first and in substitution for the first. And I drew your attention on several occasions to the language of the Institutes, where it is said that if the contract does not go on to express that the second shall be substituted in lieu of the first, and to the exclusion any longer of the liability of the first, it should be a case of *cumulation* and not of *novation*, and the liability of the second should be added, but without prejudice whatever to the continuance of the liability of the first. There is not a trace here of any engagement between the parties to substitute the second for the first. There is not the slightest trace that it ever entered into their heads; but, on the contrary, there is this distinct proof given:—"And whereas the Anglo-Australian and Universal Family Life Assurance Company, being desirous that the said assured should have the additional guarantee of the British Provident Life and Fire Assurance Society"—they were to have the additional guarantee, and it is given accordingly as part of the contract of transfer, and in consideration of what is here stated. Therefore, in point of fact, the contract was this: the Anglo-Australian Company bargained, when it parted with the property and transferred it to the other, "now in consideration of this transfer, you shall be bound to the original creditor as fully as we ourselves are bound, but you shall be bound by cumulation, by addition and not by substitution." Hence it was that each succeeding transferee company took a place by the side of the original contracting company. They were put by the side of that company as an additional debtor. They did not usurp the place occupied by that company, and dismiss that company from its situation of liability. I think, therefore, there is no doubt that these creditors have at present an existing liability from all the companies now before me, as well the Anglo-Australian Company as the others—that they are entitled to sue every one. I will not go so far as to say that there is a joint contract, but they are entitled to sue severally every one for the entirety of the debt; with this difference, perhaps, only, that they might sue the first transferee company for the amount of the debt due at the time of that transfer, and the second transferee at the time of that transfer, but to sue them as being persons liable to them and made liable by that contract which I have just read to you, namely, a contract that was put around the necks of the transferee company by the Anglo-Australian Company in consideration of the transfer made to them by the Anglo-Australian Company. And where there are four persons liable on several contracts for the same thing to a fifth, and the contracts are now presently sueable and capable of being enforced, if the bankruptcy of the four intervene, in lieu of the four actions, there may be four concurrent proofs by the creditor, limited only by this check, that he shall not receive more than 20*s.* in the pound. I shall declare, therefore, that it is not a case in which Mr. Harman accepted the liability of any company in lieu of and in discharge of the original, that these companies became bound and liable to Mr. Harman by way of addition, and not by way of substitution, and that being so liable, he is entitled to have a concurrent proof; that is, he is entitled to prove the amount of his debt against each of them separately, and subject to the limitation of not recovering more than 20*s.* in the pound, he is entitled to the full benefit

Bagshawe.—That applies to Pratt also.

Lord WESTBURY.—I suppose so. What peculiarity was there?

Bagshawe.—None, my Lord. The proof will be for the value of the policies, ascertained according to the provisions of the new statute?

Lord WESTBURY.—I have declined to lay down any rule on that. If I declare that he is entitled to prove, he will go in and prove such proof as he is entitled to. If any question arises on that, there will be liberty to apply.

Napier Higgins. — There may be different amounts of proof as against each company.

Lord WESTBURY.—There may be.

Napier Higgins.—That is all open.

Bagshawe.—Nothing is said as to the amount to be provided for, but whatever it is, there is concurrent proof for it as against all four.

Lord WESTBURY.—I do not now lay down any rule, that shall ascertain the value of the policy to

be proved; that will be determined in the ordinary manner.

Bagshawe.—*Pro formâ* we must issue a summons to wind-up the Anglo-Australian Company.

Lord WESTBURY.—Mr. Bagshawe. I give you your costs of the application, but if you mean to apply to put the Anglo-Australian Company in the course of liquidation, I reserve the question out of what estate these costs shall be paid, until that is done; with liberty to you to apply.

Solicitor for Mr. Harman and Mr. Pratt, *George Blagden.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Tuesday, June 17.

DOMAN'S CASE; SULIVAN'S CASE.

Company—Winding-up—Contributory — Amalgamation of companies—Enrolment of transfer—Attempt to make a former shareholder in the old company a contributory, on the ground that the transfer of the shares to the new company was void, and that the arrangement for amalgamation was ultra vires.

The E. Company was established under a deed of settlement, dated the 10th July 1820. In 1844 the company obtained an Act of Parliament conferring on it certain powers, and enacting that on a transfer of shares a memorial should be enrolled in Chancery within six months, of the name, &c., of the transferor and of the transferee, and that until such enrolment the persons whose names should appear in the last enrolled memorial should be liable to all legal proceedings under the Act as existing shareholders of the company.

In 1858 arrangements were made for the transfer of the business and assets of the E. Company to the P. Society. A deed of amalgamation was executed, whereby, in pursuance of these arrangements the E. Company transferred their business and assets to the P. Society, which covenanted to pay and satisfy the debts and liabilities of the E. Company, and to indemnify the shareholders of the E. Company in respect thereof.

Some of the shareholders of the E. Company received 8l. per share, and the rest (excepting five) received shares in the P. Society in respect of their shares in the E. Company. In consideration thereof they transferred their shares in the E. Company to the general manager of the P. Society. No memorial of these transfers was ever enrolled in Chancery, nor were they registered in the books of the company. The transferring shareholders whose names remained in the last enrolment, and in the books of the E. Company as holders of shares, were in the winding-up placed on the list of contributories to the E. Company. On their application to have the names removed from the list, it was

Held, that each of them was entitled to say that the agreement between the E. Company and the P. Society ought, so far as he was concerned, to be treated as an agreement fulfilled in substance, requiring only a certain solemnity to be performed, and the duty of supplying that solemnity was an engagement contracted for by the P. Society, and if the transfer by him was incomplete in respect of that formality, it was a want by which nobody claiming under the P. Society or coming in by virtue of its position could assert any right as against him.

Accordingly, a declaration was made that by virtue of the contract between the E. Company and the P. Society, D., one of the transferring shareholders, had a right, as against the P. Society, to have full legal effect given to the transfer of his shares by every solemnity, and to receive and retain the money paid to him for the same, and that he ought to be considered as discharged from the status of shareholder in the E. Society; but this declaration was without prejudice to any question as to the liability which D. might be under by virtue of his name remaining on the memorial of shareholders of the E. Company, to persons being creditors of the E. Company and not having notice of or coming under the contract between the E. and P. Companies. Without prejudice to this question, D.'s name was removed from the list of contributories.

THIS was an application on behalf of Mr. Doman to have his name removed from the list of contributories to the European Life Insurance and Annuity Company.

The company was established under a deed of settlement, dated the 10th July 1820. This deed contained provisions, enabling extraordinary general meetings of shareholders to make new laws, regulations, and provisions for the better government of the company, or to amend, alter, or repeal all or any part of the existing laws, regulations, and provisions of the company.

Some new regulations were subsequently made, that a junction might be effected with any other insurance company, or a dissolution of the company might be made; and in case of a dissolution it might be carried into effect in such manner as the directors might think advantageous, and they were to make arrangements with some other insurance company to discharge the remaining claims and demands upon the company.

In 1844 an Act of Parliament (7 & 8 Vict. c., 48 local and personal) was passed empowering the company to sue and be sued in the name of certain of its officers, and also containing the following provisions, *inter alia:*

Sect. 18:

And be it enacted that within six months after the passing of this Act the company shall cause to be enrolled in the High Court of Chancery a memorial, verified as hereinafter mentioned, of the names, residences, and descriptions of the directors, trustees, and secretary for the time being of the company and of the shareholders thereof. . . . And when any persons shall cease to be shareholders of the company, or when any other persons shall be admitted as shareholders of the company, the company shall, within six months from the happening of such event cause to be enrolled in like manner a memorial of the name, residence, and description of every person so ceasing to be a shareholder of the company, and of every person so admitted to be a member thereof.

Sect. 23:

And be it enacted that, until the memorial by this Act required to be enrolled in the event of any director, trustee, secretary, or shareholder of the company ceasing to be such director, trustee, secretary, or shareholder, have been enrolled, the persons, whose names shall appear in the then last enrolled memorial, and their legal representatives, shall be liable to all legal proceedings under this Act, as existing shareholders of the company, and shall be entitled to be reimbursed out of the funds or property of the company for all losses sustained in consequence thereof.

In August 1858 proposals were made to the

European Company by the People's Provident Society for the transfer of the former company's business to the latter society. The deed of settlement of the People's Provident Society contained a provision enabling the directors to purchase the business of any other insurance company upon such terms as to them might seem expedient (clause 104, *vide sup.*, p. 5).

On the 29th Sept. 1858, a special general meeting of the proprietors of the European Company was held, and it was resolved that the junction of the two companies be carried out on these terms:

1. That the goodwill, property, and assets, and also the debts and liabilities of the company shall, as from the 31st day of December, 1857, be transferred to and accepted and adopted by the said People's Provident Society.

2. That the European Company, and all past and present proprietors thereof, and their respective representatives and estates, shall be indemnified by the said People's Provident Society from the said debts and liabilities, and that a proper covenant for that purpose shall be entered into by the said society. . . . .

4. That each of the proprietors and other shareholders of the European Company shall, for each of his or her shares in the capital of the company, be entitled to five fully paid-up shares of 2*l.* 10*s.* each in the capital of the said People's Provident Society, in lieu and in full satisfaction for his or her shares in the capital of the company, but with the option (if declared in writing and sent to the office of the said society within two calendar months from the date of the deed or deeds by which the said transfer shall be effected) of receiving for each of his or her shares in the capital of this company the sum of 8*l.* in cash, to be forthwith paid to him or her out of the funds of the said society. . . . . .

(Clauses 3. 5, and 6 related to provisions about the directors, secretary, and other officers of the company.)

The arrangements were approved of at other meetings of the companies, and ultimately the negotiations resulted in a deed of junction or amalgamation, dated the 8th Dec. 1858, whereby after reciting, *inter alia*, the resolution approving of the arrangement for the junction of the two companies, and the provision of the European Company for its junction with any other company, and the provision of the Peoples' Provident Society's deed of settlement for the purchasing of another company's business, it was witnessed that "in pursuance and further performance of the said arrangement for a junction of the European Company with the People's Provident Society, and in consideration of the premises and also in consideration of the covenants on the part of the People's Provident Society thereinafter contained, and for carrying out the said resolution," the European Company granted and assigned to the People's Provident Society the goodwill and benefit of the business of the European Company, and all the estate, assets, and effects of the European Company; and the People's Provident Society covenanted to pay or satisfy the then outstanding debts and liabilities of the European Company, and to indemnify all the then present and former proprietors of shares in the European Company against all actions, &c., in respect of the non-payment of such debts and liabilities.

On the execution of this deed the European Company ceased to carry on business, and the stock and other property of the company were transferred to the People's Provident Society.

In accordance with the arrangements for the amalgamation, 173 persons, holding an aggregate of 4676 shares in the European Company (out of a total of 178 shareholders, holding 5026 shares, of which 496 stood in the names of trustees of the company), took either 8*l.* per share, or shares in the People's Provident Society, in satisfaction of their shares in the European Company, and they executed transfers of their shares to Mr. Cleland, the general manager of the People's Provident Society. The remaining five shareholders, holding 350 shares, made no attempt to alter their status, as shareholders of the European Company. One of the transferring shareholders was Mr. Doman, who held four fully paid-up European shares of 20*l.* each, of which, on the 26th Feb. 1859, a transfer was executed, whereby he transferred them to Mr. Cleland, and Mr. Cleland accepted the shares. The consideration for this transfer was 32*l.*, which was paid to Mr. Doman by Mr. Cleland. No memorial of this transfer was ever enrolled in the Court of Chancery, pursuant to sect. 18 of the 7 & 8 Vict. c. 48, and Mr. Doman's name appeared in the memorial last enrolled, as an existing shareholder of the European Company. Moreover the transfer was never registered in the books of the company, and Mr. Doman's name remained on the books of the company, as holding the shares.

On the 20th Jan. 1873, on the petition of an annuity-holder, the European Company was ordered by the arbitrator to be wound-up.

The official liquidators had placed Mr. Doman's name on the list of contributories, and he now applied to have it removed.

Jackson, Q.C. and *F. C. J. Millar* for Mr. Doman.—This case is like *Rivington's case* (*sup.* p. 57.) [Lord Westbury.—When you refer to *Rivington's case*, remember this, that I shall not hold myself bound by that decision to prevent my coming to any different determination in this case.] The cases differ in one respect only; here there was no enrolment of the transfer; and that difficulty may be met in two ways: First, the object of this clause as to enrolment referred to the company as a going concern, and if the existence of the company in that character was put an end to, the memorial was no longer requisite; secondly, the enrolment was not a condition precedent to the validity of the transfer of the shares. All that the statute says is, that for the purpose of legal proceedings under the Act the transferring member, who has not had his transfer enrolled, shall be liable. The liability was created by the Act, and was to be used merely for the purposes of the Act.

Napier Higgins, Q.C. and *Montague Cookson*, for the official liquidator.—The European Company was a common law partnership, subject to the Act of Parliament which it obtained, conferring on it certain special powers, but restricting those powers by certain provisions for the protection of persons dealing with the company. One of these provisions was the enrolment of transfers; the enrolment of a transfer was a *sine quâ non* in making it effectual. [Lord Westbury.—It is very true that the enrolment may be peremptorily required, as to the thing the transfer of which was to be enrolled. But if it was an operation only to transfer the business of the transferring company, the transferring company thenceforth ceases, the company being in reality at an end.] The transferring company had no right to make the transfer; there is no clause in the deed of settlement enabling the company to make a transfer of its business to, or an amalgamation with, another company. The

only thing that relates to this is in the bye-laws, and is not in the deed of settlement. In *Rivington's case* there was an admission on the part of the company that the transfer was effectual to all intents and purposes, and it was held that creditors and all persons interested had acquiesced for twelve years. Here the annuitant never had any intimation that Mr. Doman had ceased to be a creditor, and if she had gone to inquire, she would have found Mr. Doman's name in the books as the holder of four shares. These creditors who had no notice of the transfer ought not to be prejudiced by it, when it was not effectually completed in accordance with the Act of Parliament.

Lord Westbury.—

This case has been argued with great ability. It presents many questions which naturally give rise to subtle arguments, but I think it is capable of being analysed and reduced to certain clear propositions and conclusions, which will involve all that can now be determined, although it may be necessary, from the position of the parties, to reserve the question as to the liability of Mr. Doman to the creditors and annuitants of the European Company, arising from the fact of his still remaining a registered member of that company. Now I must first distinguish the position of the parties before me. Mr. Doman was a shareholder in the old European Company. He was a party to the agreement, by which the European Company formed a contract of junction with the People's Provident Society with a view to transfer its business and its *status* as an insurance company to the People's Provident Society. The other side is the official liquidator. He represents a variety of persons—the original European Company; the People's Provident Society, the transferee of the original European Company; and, besides this corporate society, he represents the individual rights and interests of the creditors and annuitants of the European Company, so far as they have a legal existence, independently of the rights and title of the European Company itself. Advantage has been taken of that to argue that the rights of the annuitants and the rights of the creditors are not, and ought not, to be necessarily concluded by a view of the case, which may end in pronouncing for an indemnity to Mr. Doman. Now Mr. Doman asks, why have I been put provisionally on the list of contributories? The answer given by the other side is because we find you a registered member of the European Company, and that registration has not been affected or altered. Mr. Doman, dropping all subtleties, in effect says to that: "If I am still a registered member of the European Company upon the Chancery enrolment, it is the fault of your society—your official liquidator. There was a contract made between my company and you; that contract ought to have been faithfully fulfilled by you; and if it had been so fulfilled, the erasure of my name from the memorial would have been a matter of course, entering into the specific performance of that contract, and you no longer could have depended on my name appearing upon the memorial." The answer which is, in effect, given to that by the official liquidator is, first, a denial of the validity of the contract of transfer between the two companies, which is asserted and set up by Mr. Doman. We have entered into that at some length, but I do not think that any new view has been added to the argument beyond those that were presented to me upon the same subject in the case of Mr. Rivington (*supra*, p. 57). The history of this company, namely, the European Company, has been traced *ab initio*. We find it a company of partners in the year 1821. We find it in a position, in which it availed itself of certain powers conferred by an Act of Parliament, and then, by virtue of certain rules and regulations made in conformity with the statutory powers, we find the European Company relegated to the character and status of a corporate body, with power, after certain formalities, in the majority of the shareholders to bind the minority. After that historical view, there being no imputation of any informality in the exercise of these powers, we come to the negotiations between the two companies, between the European Company and the People's Provident Society. Now there has not been pointed out to me any particular portion of those negotiations, which finally ripened into a contract, which was *ultra vires* of either the People's Provident Society or the European Company, or which contained within itself anything illegal or unfit to be carried into effect. Then in the terms of the contract we find the most specific engagement that it was the duty of the People's Provident Society, as to certain shareholders of a particular description, including Mr. Doman, that they should be offered in the arrangement between the two companies the option of receiving 8*l.* per share, which would be a full satisfaction of the shares, and, in point of fact, a purchase of the shares by the People's Provident Society. I find then an arrangement made for the nominal transfer of all the property of the European Company to the People's Provident Society through the medium of its being centered, merely for the purpose of holding an ultimate distribution, in a Mr. Cleland; and in that way the transaction is carried into effect; and judging these things, as they ought to be judged, by the light of fair dealing, and of plain honesty, and of a right to rely on assurance and good faith, I find Mr. Doman in this position, that he has a perfect right to rely on everything being done to provide for his perfect emancipation from the status of shareholder by the People's Provident Society, with whom his company had contracted. I consider, therefore, that Mr. Doman has a right to say to the People's Provident Society, and to his own company, and to all persons claiming under them, except by possibility a certain class of claimants whom I will presently refer to:—"This agreement between the European Company and the People's Provident Society ought, so far as I am concerned, to be treated as an agreement fulfilled in substance, requiring only a certain solemnity to be performed, and the duty of supplying that solemnity was an engagement contracted for by you, the People's Provident Society; and if the perfect transfer by me is incomplete in respect of that formality, it is a want and an imperfection by which nobody, claiming or coming in by virtue of your position and status, can assert any right as against me." Now, if that is the state of things, the nature of the case will be a very obvious and a very simple one. Mr. Doman would have a right to say, "You shall make that contract good; it is not unperformed, it is substantially performed; but there is a technical legal solemnity wanted, which it was in your power to have supplied, which it is in your power now to supply, and

which therefore it is your duty to supply." Then Mr. Higgins suggests, and with very great reason, that there is a peculiar difficulty—namely, that the Act of Parliament, which was passed in the year 1844, not only went to suspend—for that is the more proper word—the operation of every transfer that was not memorialised, but it went on to declare that, so long as the original name remained upon the memorial, and the memorial was not erased and controlled by the subsequent transactions, the parties having rights against the company should have a right to resort to the shareholder, whose name was so memorialised, precisely as if nothing had been done by that shareholder to alter his legal position. Then Mr. Higgins pressed me with this consideration, "How can you accede to Mr. Doman's application to be struck off altogether from the list of contributories, and, as a consequence, to have his name erased from the memorial, seeing that, whether it be by Mr. Doman's fault or not, or by the fault of any other person, *de facto* persons, having no notice of what had been done, had rights under this Act of Parliament, which the equity of Mr. Doman against the People's Provident Society cannot control or affect." Well, I do not mean to say that I accede entirely to that proposition; but I mean to say this, it is possible that that may be found hereafter an important consideration, provided the persons in that condition are not fully paid out of the assets of the People's Provident Society, and therefore if the counsel for Mr. Doman are content, I should make a declaration in this way: That by virtue of the contract between the European Company and the People's Provident Society, which appears to me to be a valid and binding contract, Mr. Doman has a right, as against the People's Provident Society, to have full legal effect given to the transfer of his shares by every solemnity, and to receive and retain the money paid to him for the same, and that Mr. Doman ought to be considered as altogether freed and discharged from the status of shareholder in the European Company; but this declaration is without prejudice to any question as to the liability which Mr. Doman may be under, by virtue of his name remaining upon the memorial of shareholders of the European Company, to persons being creditors of the European Company, and not having notice of or coming under the contract between the European Company and the People's Provident Society; and with that exception — I do not mean to involve in the exception any declaration—but, without prejudice to the claim of any such persons, Mr. Doman will be struck off the list of contributories, with a declaration that Mr. Doman has a right, as against the People's Provident Society to have his name erased from the register of shareholders. Now many other questions may possibly arise hereafter by virtue of that exception; but I think there is one broad highway through the case, namely, that which places Mr. Doman under the shelter of that agreement, which throws upon the People's Provident Society the duty of performing that agreement to Mr. Doman—that fixes the indemnity in respect of his shares—its validity and the liability of the company to carry it into effect—and then having regard to the peculiar circumstances that in all matters of this kind rights are frequently created in favour of third persons by special enactment, as to which the third person has a right to repeat and to hold that they are untouched by any other claims as between the principal parties, I reserve to Mr. Higgins the power of enforcing that particular statutory liability, if the circumstances shall ever arise, which will enable him to resort to that secondary right. Those circumstances may probably be found to be the insufficiency of the assets of the People's Provident Society to answer all the claims that might be enforced by virtue of that registered memorial against Mr. Doman. I hope I have made myself clear to you, and, if so, I think there will be no difficulty in dealing with the case hereafter. The costs of this day's hearing must come out of the People's Provident Society's estate.

Sulivan's case.—In this case the consideration for the transfer of the European Company shares was, instead of cash, for each share five fully paid-up shares of 2*l.* 10*s.* each in the People's Provident Society. The same order was made in this case as in *Doman's case.*

Solicitors for Mr. Doman, *Wood, Street,* and *Hayter.*

Solicitor for Mr. Sulivan, *J. D. Bolton.*

Solicitors for the official liquidators, *Mercer* and *Mercer.*

END OF THE FOURTH SITTINGS.

THE

EUROPEAN ASSURANCE ARBITRATION.

(BEFORE LORD ROMILLY.)

FIFTH SITTINGS.

REPORTED BY R. MARRACK, ESQ., BARRISTER-AT-LAW.

Oct. 29 *and* 30, *and Nov.* 26, 1873.

D'OUSELEY'S CASE.

Company—Winding-up — Contributory — Married woman—Separate estate—Husband placed on the list of contributories in respect of shares purchased by the wife.

Where a legacy is bequeathed to a married woman, and her husband consents to her receiving it, and employing it as she thinks fit, and with a portion of the money she purchases shares in a company in her own name, and as her own separate estate, the purchase being effected through an agent of the company, to whom she is known as a married woman, and she subsequently receives the dividends, and the husband never deals with the shares in any way; he is nevertheless liable to be placed on the list of contributories in respect of the shares in the winding-up of the company.

THIS was a question as to the liability of a husband in respect of shares taken by his wife.

The European Assurance Society was established in 1854, under a deed of settlement. It was subsequently registered under the Registration Act, 1844 (7 & 8 Vict. c. 110), and also under the Companies Act, 1862.

Mr. D'Ouseley married Mrs. D'Ouseley in 1850, but since Aug. 1872 they had been separated, and were now living apart from each other.

In 1867 Mrs. D'Ouseley became entitled under the will of her aunt to a legacy of 1000*l.*, and the sum was paid to her personally upon her receipt in Aug. 1867. It was now alleged by Mr. D'Ouseley that he assented to her receiving the money for her separate use, and that he never received or made any claim to any part of it, or in any way interfered with the disposition of it; and that the sum was wholly dealt with by her as moneys belonging to her for her separate use.

Mr. D'Ouseley had effected a policy of assurance on his own life with the European Society through Mr. Crompton, the local district agent of the society at Liverpool; and Mrs. D'Ouseley knowing, the agent through this, informed him that she had some money to invest, and he thereupon advised her to invest it in shares of the European Society. Accordingly he procured for her 800 shares in the society in the months of Sept. and Oct. 1867. The sum of 326*l.* 5*s.* was paid by Mrs. D'Ouseley to the agent in respect of the shares out of the legacy of 1000*l.*, and her name was put on the register as the holder of the 800 shares. The agent was well aware that Mrs. D'Ouseley was a married woman. Mr. D'Ouseley in no way concurred or assisted in the purchase of the shares, nor did he subsequently adopt or approve of it or receive any benefit therefrom. The dividends were paid to Mrs. D'Ouseley personally, and she gave receipts in her own name.

In 1868 he wrote to the manager of the society as follows:

31st Dec. 1868.

Dear Sir,—Mrs. D'Ouseley being desirous to realise the amount of the shares standing in her name in the European Insurance Company, requested me to speak to Mr. Crompton, on the subject. I have his letter received this evening, referring me to you on the subject.

Mrs. D'Ouseley would feel obliged if you would cause her shares to be placed in the market for sale, and trusts you may realise the amount paid for them, and oblige

Yours very truly,

RICHARD S. D'OUSELEY.

No sale of the shares was effected, and in July 1869 a call of 5*s.* a share was made. This call was not paid at the time, and in March 1870 Mr. Bunn, an authorised agent of the society, told Mr. D'Ouseley that he was empowered by the society to demand payment of the call, and to make a compromise of the call and of all future calls. Mr. D'Ouseley, however, denied his liability, as well as that of his wife. Subsequently, in Sept. 1870, an arrangement was made between Mr. D'Ouseley and Mr. Bunn that promissory notes for 600*l.*, payable at different periods extending over six years, should be given by Mr. D'Ouseley as a compromise for all calls, past and future, on the 800 shares. The first two notes, amounting to 100*l.*, were paid, but on the third note becoming payable in March 1871, he refused to pay the money, and repudiated his liability on the remaining notes.

The society was ordered to be wound-up in Jan. 1872, and in July 1872 a notice was sent to Mrs. D'Ouseley that she would be placed on the list of contributories. Afterwards a notice was sent to Mr. D'Ouseley that he would also be placed on the list. Mr. D'Ouseley now applied to have his name removed from the list of contributories.

The Society's deed of settlement contained the following clauses:—

Clause 92:

That the husband of any female shareholder, or the executors or administrators of any deceased shareholder, shall not in those capacities be a shareholder or shareholders in respect of any share or shares, which belong to his wife, or his, her, or their testator or intestate; but such husband, or executors or administrators, or any one or more of such executors or administrators may, in the manner and upon the terms hereinafter mentioned, either become a shareholder or shareholders, or procure some person or persons to become a shareholder or shareholders in respect of such share or shares or any

of them: yet nothing in these presents contained shall take away or be construed to take away the liabilities of such husband, or executors or administrators in those capacities, or of the estate of such female, or deceased shareholders, or shareholder, in respect of such share or shares.

Clause 94:

That before the husband of any female shareholder, or the executors or administrators of any deceased shareholder, can become a shareholder or shareholders, or can procure some other person or persons to become a shareholder or shareholders in respect of all or any of the shares which belonged to his or their wife, testator, or intestate, and before the assignees of any bankrupt or insolvent shareholder can procure some other person or persons to be a shareholder or shareholders in respect of all or any of the shares which belonged to such bankrupt or insolvent shareholders, he or they shall respectively leave, or cause to be left, at the office of the company, for the space of five days, the certificate or other satisfactory evidence of marriage, or the probate of the will, or the letters of administration, or the certificate of appointment or vesting order, under which he or they shall respectively claim to be interested in such share or shares, or some sufficient official extract, or such will or letters of administration, or some official or attested copy of such certificate of appointment or order, to the end that minutes or extracts of the same may be entered in the books of the company.

Clause 95:

That if the husband of any female shareholder, or the executors or administrators of any deceased shareholder, or any one or more of such executors or administrators shall be desirous of becoming a shareholder or shareholders in respect of all or any of the shares which belonged to his or their wife, testator, or intestate, and he or they shall respectively give notice under his or their hand or hands at the office of the company of such his or their desire, and shall describe in such notice his or their name or names, profession, or calling, or professions or callings, and place or places of abode, and the number of shares in respect of which he or they is or are desirous of becoming a shareholder or shareholders, such husband or executors or administering executor, or administrators, shall upon executing, at the office of the company or at such other place as the board of directors or committee appointed, as hereinafter provided for the approval of shareholders shall require, a deed of covenant to abide by the provisions of these presents and other the rules and regulations of the company in respect of the share or shares for or in respect of which he or they shall have given such notice, and paying the arrears (if any) of any instalment or call actually due and payable on such share or shares, be entitled to call upon the board of directors to enter his or their name or names in the aforesaid share register book, as proprietor or proprietors of such share or shares, and upon such entry being made, he or they shall become the proprietor or proprietors thereof, and the board shall accordingly cause such entry to be made.

Everitt for Mr. D'Ouseley.—The husband never did any one of those acts which the deed requires to be done to constitute him a shareholder. The company dealt with the wife, as if the shares were part of her separate estate, and they must look to her separate estate only. If a company chooses to deal with a married woman as a principal, and not as the agent of the husband, and she, being known to the company to be a married woman, is allowed to become a shareholder in her own right, and if further, by the rules of the company, her husband is not a shareholder in respect of her shares, and she has no separate estate, then, on the winding-up of the company, neither she nor her husband will be a contributory. Not the wife, because she is not, either at law or in equity, capable of binding herself by contract; not the husband, because *ex hypothesi* he has had nothing to do with the shares or the company, and the latter has not dealt with his wife as his agent.

The following cases were cited

Re Leeds Banking Company; *Matthewman's case*, L. Rep. 3, Eq. 781;
Shattock v. *Shattock*, L. Rep. 2, Eq. 182;
Grant v. *Grant*, 34 Beav. 623;
Re Northumberland, &c. Banking Company; *Ex parte Rhodes*, 7 W. R. 510;
Re North of England Banking Company; *Angas's case*, 1 De G. & S. 560;
Broughton v. *Hutt*, 3 De G. & J. 501;
Re Bank of Hindustan, China, and Japan; *Harrison's case*, L. Rep. 6, Ch. 286.

Napier Higgins, Q.C. and *Montague Cookson*, for the official liquidators.—The money, with which the shares was purchased, was not part of the wife's separate estate. The position of a husband is this: He is liable for any shares she may purchase; if she contracts in respect of her separate estate, that separate estate may be liable also; but if she does not contract in respect of her separate estate, then her husband, who consents to her taking shares, will be held liable, although he may not himself have complied with the regulations of the company so as to render him in strictness a shareholder therein. The proper course is to settle both husband and wife on the list of contributories.

The following cases were cited:

Re Northumberland and Durham Banking Company;
Luard's case, 1 De G. F. & J. 533;
Scarisbrick's case, *sup.* p. 105.

Judgment was reserved.

Wednesday, Nov. 26.—Lord ROMILLY:—

D'Ouseley's case is a very hard one. An aunt of Mr. D'Ouseley's wife in Jan. 1867 bequeathed to his wife a portion of her trinkets, jewels, furniture, prints, pictures, drawings, and books, and also the sum of one thousand pounds. He consented to his wife receiving this legacy and employing it as she thought fit; she was informed (not by her husband, but by another person) that they might be safely invested in European shares; and accordingly she applied to Mr. Crompton, an agent of the Society, and bought the shares in her own name, and as her own separate estate. She received all the dividends, and her husband never dealt with them at all. Now that the Society is being wound-up, a claim is made upon him for the calls in respect of these shares. He, ignorant, as he says, of the state of the law, and believing himself liable, entered into a compromise, by which he gave promissory notes to the amount of 600*l.* in discharge of all his liability, under the fear of process issuing out of the courts of the Isle of Man. He now contests his liability, and the matter is brought before me. I grieve to say that in my opinion there is no doubt as to his liability. The legacy of 1000*l.* was in law his property; he could give a discharge for it; and his allowing his wife to invest the money does not prevent his being liable in the same manner as if any other agent had invested it for him. I think the case a very hard one; in consequence of its being so, I delayed, hoping that I might be able to find some mode of rescuing him from the difficulty, in which his wife's dealing with this money by his consent and with his concurrence has placed him; but I have not been able to find any means of doing so. However, I consider it so hard a case, that I shall give no costs against him.

Everitt.—As to the 600*l.* for which he gave notes, it was accepted as a kind of compromise.

Montague Cookson.—The only question now is as to the shares.

Lord ROMILLY.—It is a totally different question. He must make a fresh application, if he insists on it, respecting the notes.

Solicitor for Mr. D'Ouseley, *Thomas Johnstone.*

Solicitors for the official liquidator of the European Society, *Mercer* and *Mercer.*

June 19, *Oct.* 27, *and Nov.* 26, 1873.

MUSHET'S CASE.

Company—Winding-up—Contributory—Bonâ fide transfer—Alleged misdescription of transferee—Engineer—Consideration not actually paid to transferee—Transfer set aside and transfer or placed on the list of contributories.

In a company, being a common law partnership, where the shareholders have power to transfer their shares on the proposed transferee being approved of by the directors, it is incumbent on the intending transferor to supply the directors with all the materials and means in his power to enable them to form a just conclusion as to the fitness of the transferee to be supplied in the place of the transferor. Unless this is done, he is conniving at a fraud against the society, and the transfer may be declared void.

Thus where at a time when his company was failing, a shareholder, M., directed his broker, B., to dispose of his shares, and B. communicated with another broker, S., who supplied the name of T., and a transfer to T. was executed and registered by the society, the consideration being stated as 35l. paid to T.; and it turned out that T. was a pauper, and that he had never received any consideration for taking the shares. It was

Held, in the winding-up of the company, that the transferor must be placed on the list of contributories in respect of the shares; he being, both by his agent and by himself, aware of the nature of the transaction or being so bound by the inquiry, that it was his duty to make, that the transfer did not exonerate him from his liability.

In such cases no transfer will be allowed to stand, where the transferor does not prove that the transferee received the consideration paid for getting rid of the shares.

THIS was an application to place the name of Mr. Mushet on the list of contributories to the European Assurance Society.

The society was established under a deed of settlement, dated the 2nd Sept. 1854, and was subsequently registered under the Registration Act of 1844 (7 & 8 Vict. c. 110), and also under the Companies Act 1862.

It was provided in the society's deed of settlement that a shareholder who wished to transfer his shares should send to the society a notice of his wish, and should describe in the notice "the full name and profession or calling and place of abode of the proposed shareholder;" and on the approval of the proposed shareholder by the directors, he might transfer his shares: (clause 96, *vide sup.* p. 11.)

In Sept. 1869 a petition was presented in the Court of Chancery to wind-up the society. The petition was unsuccessful, but Mr. Mushet, who held 1400 shares, thought it advisable to make inquiries into the condition of the society; and the result was that he authorised Mr. Bell, a stockbroker of Edinburgh, to sell the shares at the best procurable price, and even to pay a sum not exceeding 50*l.* or 60*l.*, in order to dispose of them. Mr. Bell put himself in communication with another Edinburgh stockbroker, Mr. Robert Stewart, who supplied the name of George Taylor, as being willing to take the shares. The following was the contract for the sale of the shares:

Edinburgh, 30th Oct. 1869.

Dear Sir,—I hereby sell to you 1400 European Insurance Company, at 17s. discount, 16s. 6d. paid, on condition that the company register transfer of the said shares in favour of your client, who, I understand, is George Taylor, engineer, Coltbridge, Edinburgh.

Failing such registration, the transaction to fall to the ground.—Yours faithfully, WM. BELL.

Robert Stewart, Esq.

P.S. The seller is Wm. Mushet of Dalkeith.

The contract was communicated to Mr. Mushet by Mr. Bell in the following letter:

Edinburgh, 30th Oct., 1869.

Dear Sir,—I beg to inform you that I have sold in terms of your instructions 1400 shares European Insurance Company, at 17s. per share disconnt (16s. 6d. paid), to Mr. Robert Stewart, of our Exchange, on condition that the company register the transfer in favour of the purchaser, who, I understand, is George Taylor, engigineer, Coltbridge, Edinburgh. Failing such registration the transaction is to fall to the ground.—Yours faithfully, WILLIAM BELL.

Wm. Mushet, Esq.

A transfer of the shares was prepared in the form required by the regulations of the society, and was executed by Mr. Mushet and by George Taylor. On the 1st Nov. 1869, the transfer was sent to the society by Mr. Bell for registration. Objections were raised by the society on the ground that notice of the intention to transfer had not been given, and that a call of 5*s.* per share, that had fallen due in July 1869, had not been paid. In Dec. 1869 an additional call became due. In Jan. 1870 the society threatened to take proceedings against Mr. Mushet, unless the calls were paid; and he thereupon consulted his solicitors, Messrs. Gibson, Craig, and Co., and was advised by them that the society could not reject a transferee without providing a substitute. Accordingly, Messrs. Gibson, Craig, and Co. sent to their London agents, Messrs. Freshfield, a draft for 1015*l.* 0*s.* 8*d.*, the amount then due from Mr. Mushet on calls, with a direction to pay the same to the society and to send to the society a formal notice of Mr. Mushet's intention to transfer his shares to "George Taylor, of Coltbridge, near Edinburgh, engineer." The amount was paid by Messrs. Freshfield and the notice given on the 23rd March 1870. Shortly before, Mr. Mushet had written to Mr. Bell to know if he could find a purchaser, if the calls were paid, and Mr. Bell had thereupon ascertained from Mr. Stewart that George Taylor was still willing to carry his contract into effect. On the 4th April 1870, Messrs. Freshfield sent to Messrs. Gibson, Craig, and Co. a transfer to be executed by Mr. Mushet. They handed it to Mr. Mushet, who took it to his broker, Mr. Bell, at whose office he executed it, the consideration being stated as 35*l.* paid to George Taylor. The transfer was then handed by Mr. Bell to Mr. Stewart, who had it executed by George Taylor and then returned it to Mr. Bell. Ultimately, it was forwarded by Messrs. Gibson, Craig, and Co., through Messrs. Freshfield, to the society. The date of the execution of the transfer was the 7th April 1870. On

this date Messrs. Freshfield sent to the society two notices, one as agents of Mr. Mushet, and the other as agents of George Taylor, requiring the society to approve and register the transfer. Ultimately, after some applications to the society by Messrs. Freshfield with respect to the registration, the secretary wrote to them on the 26th April 1870, enclosing certificates of the shares in the name of George Taylor.

The order to wind-up the society was made on the 12th Jan. 1872, and in the winding-up the official liquidators applied that the name of Mr. Mushet should be placed on the list of contributories in respect of the shares in lieu of George Taylor, in whose name they were now registered. For it turned out that George Taylor, instead of being an engineer, was a stoker on a railway earning wages of 27*s.* a week, and having no other means of livelihood; and was thus wholly unable to pay any calls in respect of the shares. His mother, was the laundress of Mr. Stewart the broker's offices; it was not true that the sum of 35*l.* was paid to him as a consideration for taking the shares; he was promised 1*l.* for allowing his name to be used, but he never received anything. He now alleged that, when he executed the deed of transfer, he knew nothing of its contents, and that he got no explanation, save that he was to be kept all right and to be paid 1*l.*

Mr. Bell, the stockbroker, stated in his affidavit that, as regards these shares, he had dealt with the other broker, Mr. Stewart, in the ordinary course of business, according to which the purchasing broker gives the name of the purchaser to the selling broker; that he had no knowledge of George Taylor, and had no reason for supposing the description to be otherwise than correct. The consideration, 35*l.*, was paid by Mr. Mushet to Mr. Stewart through Mr. Bell, on the new certificate being issued.

Mr. Mushet in his affidavit, stated that Mr. Stewart was unknown to him, and had not acted as his agent; and that he had received the statement made by Mr. Stewart to Mr. Bell as to the transferee, without any knowledge of the transferee, without any knowledge as to the incorrectness of the description.

The case came before Lord Westbury on the 19th June 1873, but the case stood over for the production of further evidence.

Monday, Oct. 27.—*Napier Higgins*, Q. C. and *Montague Cookson*, for the official liquidators.—There was misrepresentation on the part of the transferor. The transferee was not an "engineer," and he never received a farthing of the consideration money. [Lord ROMILLY.—I think "engineer" was a false representation.] If 35*l.* had actually passed, it might, perhaps, have tended to indicate *bona fides*; because a pauper will sign a paper for 5*s.*, but such a sum as 35*l.*, or a larger sum, tends to show that it is a real transaction, that the transferee has looked into the matter, and has been paid for taking a liability upon him. Even if the transferor were ignorant of the misrepresentation, still he is responsible for what was done by his agents or by the persons procured by him. Moreover, if the transaction were intended to be *bonâ fide*, nevertheless Mr. Mushet is still liable under the provisions of the 7 & 8 Vict. c. 110. The following cases were cited:

Re Imperial Mercantile Credit Association, Payne's Case, L. Rep. 9 Eq. 223;
Snow's Case, 19 W. R. 1057;
Simpson's Case, *supra*, p. 77;
Patersons' Case, *supra*, p. 79.
Joshua Murgatroyd's Case, *supra*, p. 115.

Cotton, Q. C. and *Kekewich* for Mushet.—This case is distinct from similar cases, in which there has been knowledge on the part of the transferor or his agent that the material representation was untrue. Here the transferor effected a sale *bonâ fide*, through a broker, Mr. Bell, who sold in the market to another broker, Mr. Stewart. Mr. Stewart, who made the misrepresentation, was in no way the agent of the transferor. The transferor cannot be bound by misrepresentations made by a person who was not his agent. Where there is an out-and-out transfer, and no misrepresentation by the transferor, he is exonerated: (*Williams's Case*, *sup*, p. 84.) That case would have been wrongly decided by Lord Westbury if any objections could be raised on the ground of the provisions of the 7 & 8 Vict. c. 110, not having been complied with. With regard to the whole of the 35*l.* not having reached the transferee, it was paid to his agent Mr. Stewart, and after this the transferor had no control whatever over it.

Judgment was reserved.

Wednesday, Nov. 26.—Lord ROMILLY.—

This is an application by the joint official liquidator to amend the register of members of the European Society, by inserting therein the name of William Mushet, and that he may be settled on the list of contributories in respect of 1400 shares, which purport to have been transferred by him to George Taylor by a transfer, dated the 7th April 1870. [Having stated his view of the facts, his Lordship continued:] It is alleged that the mis-description of George Taylor complained of, in no way affected Mr. Mushet, whose agent Mr. Stewart was not, and that the transaction is unimpeachable. But such is not my opinion.

Without meaning to assert that, when a company is failing, one of the shareholders may get rid of his shares by disposing of them to a pauper, and thereby throw his portion of the debts upon the other shareholders (though I consider that this proposition was not laid down by the Lords Justices in any case before them, and it was strongly dissented from by Lord Campbell), still I am of opinion that, if such a transfer of shares can ever be supported, it is incumbent on the transferor to supply the company with all the materials and means in his power to enable them to form a just and accurate conclusion as to the fitness of the transferee to be supplied in the place of the transferor. Unless this is done, it appears to me that the transferor is conniving at a fraud against the society, and cannot gain any advantage from the transaction in which he is so implicated. These conditions, which I consider necessary, do not seem to me to have been fulfilled by Mr. Mushet. Mr. Stewart was a person regularly employed for getting rid of unsafe shares. Without saying that Mr. Stewart was technically the agent of Mr. Mushet, there are many circumstances which show that he was much more cognisant of Mr. Stewart's proceedings, and of the situation of George Taylor, all of which he ought to have communicated to the society, than he thought fit to make known to them. The conduct of Stewart is open to the gravest suspicion: he acts as no broker

would have acted on any Stock Exchange who regarded his own character; he agrees to take the shares for 35*l.*, to be paid to his client; he seeks for a client in the son of his housekeeper, to whom nothing appears to be said about the 35*l.*; at all events he never gets that sum, which is disposed of by Mr. Stewart's direction, leaving the directors to suppose that it was a transaction *bonâ fide* with a person who wanted to speculate on the probable rise of the shares. Stewart's practice was to keep men of straw to take any shares that he caused to be assigned to them, while he himself fixed the amount of the premium paid for getting rid of the shares and received the money. In such cases, I shall allow no transaction to stand, where the transferor does not prove that the transferee received the consideration paid for accepting the shares. If the directors had been acquainted with the whole transaction, it would have been a clear breach of duty on their part, of which no director cognisant could have allowed any one to take advantage without gross misconduct to the shareholders for whom the directors were trustees. I doubt whether Mr. Mushet himself considered the transaction a *bonâ fide* one; nay, it appears that Mr. Mushet himself in Feb. 1870, was trying to sell the same shares to a fresh transferee. I am confirmed in the view I take of this case by observing what Lord Westbury did respecting it in June last; and nothing that has since been done appears to me to affect the then position of the parties. It appears to me that Mr. Stewart for 35*l.*, or rather a promise of 35*l.*, got George Taylor to accept the shares, giving him nothing, and that he was a mere cat's paw to enable Stewart to carry out the transaction for his own benefit, intending George Taylor to take nothing. I think that Mr. Mushet both by his agents and by himself was aware of the nature of the transaction, or was so bound by the enquiry that he was bound to make, that the transfer of shares made by Mr. Mushet to George Taylor, does not exonerate Mr. Mushet or relieve him from the liability that he incurred by taking the shares. I am of opinion, therefore, that Mr. Mushet must be restored to the list of shareholders. The costs will follow the event. I think this is entirely a case of fraud.

Solicitors for Mr. Mushet, *Freshfields.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

Thursday, Oct. 30, 1873.

MACKENZIE'S CASE.

Company—Winding-up—Contributory—Allotment of shares—Specific performance of agreement to take shares—Person not a contributory where shares had been merely allotted to him twenty-five years before the winding-up.

The I. company was formed in April 1846, *under a deed of settlement, and was registered under the Registration Act of* 1844, *and subsequently incorporated under the Companies Act of* 1862. *In July* 1846 *M. applied for* 100 *shares, and they were allotted to him, and he paid* 2*l. per share, the sum prescribed to be paid on allotment, and his name was placed on the company's register of shareholders. In Dec.* 1846 *he died. No certificates were ever issued in respect of the shares; no dividends were ever received on them; the deed of settlement was never executed by M. or by his executors. On a call being made in* 1860, *when the company transferred its business to the E. society, no application was made to the executors for a call. M.'s name was never included in the lists of shareholders sent to the registration office under the Registration Act of* 1844, *but was included in the list of shareholders that was sent to the office on the incorporation of the company in* 1862 *under the Companies Act* 1862. *On the I. company being wound-up in* 1872, *it was*

Held, that M.'s executor was not liable to be placed on the list of contributories.

The question was one as to the specific performance of the agreement to take the shares, and the lapse of time was sufficient to bar the claim of the official liquidator against the person who had entered into the agreement.

THIS was a question as to the removal of the name of Mr. John Adamson Honey, the surviving executor of Mr. Alexander Mackenzie, from the list of contributories to the India and London Life Assurance Company.

The company was established under a deed of settlement dated the 16th April 1846, and was registered in the same year under the Registration Act of 1844 (7 & 8 Vict. c. 110). The capital was to be 250,000*l.*, in 5000 shares of 50*l.* each, and 2*l.* per share was to be paid by the subscribers immediately after the registration of the company.

In July 1846 Mr. Mackenzie applied for 100 shares in the company, and they were duly allotted to him, and he paid the company 200*l.* for them, being the prescribed sum, 2*l.* per share. His name was entered on the register of shareholders of the company in respect of 200 shares.

On the 12th Sept. 1842 Mr. Mackenzie had executed a deed of trust, disposition, and settlement (which was recorded in the Books of Council in Session in Scotland on the 9th Jan. 1847), and thereby appointed John Adamson Honey, J. M. Honey, and David Mackenzie, trustees. On the 29th Dec. 1846 Mr. Mackenzie died, and these three trustees exhibited an inventory of the personal estate of Mr. Mackenzie. Item 11 of this inventory was: "100 shares in the India and London Life Assurance Company at 2*l.* per share, 200*l.*" On the 11th May 1847 confirmation of the estate and effects of Mr. Mackenzie was granted to James Adamson Honey, J. M. Honey, and David Mackenzie by the Commissary Court of Perthshire.

In April 1847, the following correspondence took place with reference to the shares between the acting executor and the manager of the company:

16th April, 1847.

Dear Sir,—On the part of the executors of the late Alexander Mackenzie, Esq., town clerk, Perth, who are in the course of administering to his estate, I beg to be informed if it is necessary to adopt any other steps than confirmation in Scotland, to take up the shares of the company held by the deceased. I observe from a letter of yours, dated 23rd June last, that the late Mr. Mackenzie obtained 100 shares of your company, and that seems to be the only estate which may be held to be situated in England, consequently it is a matter of some importance if the said shares can be administered to by confirmation here. I would require also to know what the amount of each share is, how much has been paid up, and what was

the value of the share according to the selling price, as at 29th Dec. last.

G. N. Stewart, Esq., Manager, India and London Company.

26th April, 1847.

Dear Sir,—On the part of the executors of the late A. Mackenzie, city clerk, Perth, who appears to hold 100 shares of the stock of the said company, I wrote you on the 16th inst. requesting to be favoured with certain information, but I have not received an answer. Lest my letter may have miscarried, I send you annexed a copy of it, and shall feel obliged by your favouring me with an answer as early after receipt of this as is possible. Until I know as to whether or not the shares of the said company can be taken up by proceedings in Scotland, the executors are prevented from making up their title to the deceased's estate, even in Scotland. Perhaps, should there be no clause in the deed of agreement in favour of Scotch shareholders and their successors, the company might not insist on, in this case, probate in England. The deceased left his heritable and movable property by will to trustees, who are also named executors, to be applied for certain purposes, and no one but the trustees and executors will lay claim to the said shares.

G. N. Stewart, Esq., Manager,

28th April, 1847.

Dear Sir,—I had not lost sight of yours of the 16th, but circumstances prevented me from replying fully before this date. I allude solely to engagements from home. I have now to inform you that the directors of the India and London Life Assurance Company will accept the executors of the late Alexander Mackenzie, Esq., who have administered or who may hereafter administer to his will by confirmation in Scotland, as shareholders in respect of the shares to which the late A. Mackenzie was entitled. Only 2*l.* deposit has been paid on each share allotted, and I am not aware that any have been offered for sale in the stock and share market of London. —— Wright, Manager.

In 1860 the India and London Company transferred its business to the European Assurance Society.

On the 20th April 1872, an order was made by the Court of Chancery to wind-up the India and London Company. In the winding-up the official liquidators placed the name of Mr. John Adamson Honey, the sole surviving executor of Mr. Mackenzie, on the list of contributories in respect of the 200 shares, and an application was now made to remove the name from the list.

No certificates had ever been issued in respect of the shares; dividends were declared from time to time by the India and London Company, but none were ever offered to Mr. Mackenzie or his executors. Neither Mr. Mackenzie nor his executors ever executed the deed of settlement of the company. On the amalgamation in 1860 there was a call of 15*l.* per share, but no application was ever made to the executors with respect thereto.

Mr. Mackenzie's name was never included in the lists of shareholders sent to the Registration Office under the Registration Act of 1844, but in 1862, when the company was incorporated under the Companies Act 1862, his name was included in the list of shareholders as holding 100 shares; but since 1862 no return of shareholders appears to have been sent to the Registration Office.

The deed of settlement of the India and London Company contained the following provisions:—

Clause 114:

That the husbands of female proprietors and the executors or administrators of deceased proprietors or the assignees of bankrupt or insolvent proprietors and the committees of lunatic proprietors shall not be proprietors in respect of the share or shares held by them in any of those capacities, but any such husbands, executors, or administrators may sell and transfer such shares in manner hereinafter expressed, or become proprietors in respect of such shares, first giving within six calendar months from the marriage or the death, at the office of the company notice in writing of such desire, expressing the name and place of abode, and proper addition of the person giving the same, and the name of the proprietor in whose place or right he claims, and the number of shares in respect whereof he is desirous of becoming proprietor, whereupon, and upon otherwise complying with the provisions of these presents, he shall become proprietor in respect of such shares, and the same shall be transferred into his name, and he shall be personally charged with the duties and liabilities incident to the ownership of the same.

Clause 116:

That every such husband, executor, or administrator not electing to become a proprietor, and every assignee of a bankrupt or insolvent proprietor and committee of any lunatic proprietor shall have the same right of selling and transferring the shares vested in him in such capacity as the proprietor under whom the claims would have had, and upon transfer of any such share and registry of the same, and not before, such husband, executor, administrator, or assignee, or committee shall be entitled to receive the arrears of dividends, interest, and profits in respect of such shares.

Southgate, Q.C. and *Woodroffe* for the executor.—If this were the year 1847, Mr. Mackenzie would be liable to be made a contributory. He agreed to take the shares, and could have been compelled to take them. But now the lapse of time is of itself an answer to a suit for specific performance. His agreement to take shares did not constitute him a shareholder. Under the Act of 1844, he could not be a shareholder until he had executed the deed of settlement. And under the Winding-up Act of 1848 it was not the custom to alter the register. A contributory was a person who was a shareholder.

Napier Higgins, Q.C. and *Montague Cookson* for the official liquidators.—Mr. Mackenzie was entitled to become a shareholder. He applied for the shares, the shares were duly allotted to him, and he was entered on the register as a shareholder; no application was ever made to remove his name from it. As on the one hand the company would be estopped from denying that he was a shareholder, so on the other hand, although the formality of executing the deed was not complied with, he would be estopped from denying that he was a shareholder. However, a man may be a contributory, although he is not technically a shareholder. Under the Companies Act of 1862, part viii., s. 200 (applicable to this company), a contributory is defined in almost the same terms as in the Winding-up Act of 1848. The chief question that can be raised is with respect to lapse of time. The directors were not responsible for the lapse of time. Neither Mr. Mackenzie nor the executors ever complied with the requisitions of the deed. [Lord Romilly.—You might have compelled them.] We were not bound to try and enforce the agreement against the executors. [Lord Romilly.—No, I do not think you were; but you must take the consequences of not having done so.] No, for Mr. Mackenzie was on the list of shareholders. [Lord Romilly.—He did not choose to claim anything.] We contend that the directors were guilty of no *laches* whatever. The executors could not by merely keeping quiet relieve their testator's estate from its liability. Moreover, their letters show that they took to the shares and accepted the liability. The following cases were cited:—

Re Merchant Traders' Ship, &c., Association, Yelland's case, 5 De G. & S., 395.

[Lord ROMILLY.—But for time, this case is ou all fours with *Yelland's case.*]

Re Electric Telegraph Company of Ireland, Cookney's case, 26 Beav. 6 ; 3 De G. & J., 170 ;
Re North of England Banking Company, Straffon's Executor's case, 1 De G. M. & G. 576.

Lord ROMILLY.—

I think that the executor of Mr. Mackenzie ought not to be put upon the list of contributories. There are in these cases always two points, which occur very strongly according to the manner in which the case is brought before the court. Wherever a long lapse of time has taken place, if the company has made profits, then the application is by the shareholder to obtain the profits and to claim the benefit of the shares ; but if, on the other hand, the company has failed in making any profits, then the application is by the company to make the shareholder a contributory. Now, I think both of these cases are to be treated as cases of specific performance. If you treat them as cases of specific performance, there is of course, in both cases, a degree of lapse of time, in which the party who has been guilty of the *laches* must be held to be responsible. I agree with what Mr. Higgins says, that it was not for the company to make any application on the ground of specific performance, because they were not required to bind the party who was applying for the shares. But the application here is an application more than twenty years after allotment, which has always been considered more than sufficient to bar the claim. And the application is that the executor shall be made a contributory to the company for the whole of that time, just as if he had been taking the benefits of the profits of the company during the period. I will look at the cases that Mr. Higgins has referred to in Mr. Lindley's book on partnership (p. 1401), and, if it is necessary, I will mention it again; but I do not think that it will be found, upon any reference of that description, that there are any cases in which there has been so long a lapse of time.

Southgate.—May I read from p. 1404 of Mr. Lindley's book on partnership: "An agreement to take the shares, which has not been acted upon for so long that neither party can enforce it against the other, will not render the person who agreed to take them a contributory. This follows from the ordinary doctrine of equity applicable to the specific performance of agreements ; and where a person in this position was sought to be put on the list in order to obtain a share of surplus assets, he was held not entitled to be on it."

Lord ROMILLY.—It is upon that principle that I hold both parties must be bound. A person, if he were likely to obtain assets, could not maintain a claim to be put on the list. So here, where he is to be made a contributory, he cannot be made liable to be put on the list as a contributory.

Solicitors for the executor, *Kennedy* and *Hughes.*
Solicitors for the official liquidators of the India and London Company, *Mercer* and *Mercer.*

Friday, Oct. 31, 1873.

WILLIAM HENRY BENTINCK'S CASE.

Company—Winding-up—Contributory—Infant.

Liability of a person, who had, when an infant, bought shares in a company.

Where an infant purchased shares in a company, the fact of his being an infant being unknown to the company, and an order was made to wind-up the company before he became of age, and after his attaining twenty-one he repudiated the shares, it was

Held, that he ought not to be put on the list of contributories in respect of the shares.

He was ordered to pay back to the company the dividends that he had received.

In order to have the name removed from the list of contributories, it was not necessary to bring the transferor before the court.

THIS was a question as to the liability of a person who had, when an infant, taken shares in a company.

William Henry Bentinck was born on the 17th Oct. 1851. In July 1866 (being in his fifteenth year) he purchased 100 shares in the European Assurance Society. The purchase was effected through a broker, and the transferor was Mr. Edward Gray. The purchase-money was 25*l.*, and was supplied to Mr. Bentinck by his mother out of her separate estate.

In 1867 and 1868 he received three dividend warrants of 1*l.* 8*s.* 9*d.* each in respect of the shares. At the time of the purchase, and of the payment of these dividends, the society had no reason to suppose he was an infant.

On the 10th June 1871 a petition was presented to wind-up the society, and the order to wind-up was made on the 12th Jan. 1872.

Mr. Bentinck attained the age of twenty-one years on the 17th Oct. 1872, and after that date he never dealt in any way with the shares, but repudiated the ownership of them.

His name being on the register of shareholders, the official liquidators in the winding-up placed it on the list of contributories, and he now applied to have it removed. He stated that he had caused inquiries to be made with a view to finding the transferor, Mr. Gray, but it had not been possible to discover him and serve him with notice of the application.

Hemming for Mr. Bentinck.—When an infant executes what purports to be a contract, it is a nullity; it is simply capable of ripening into a contract, when he attains his majority; but in this case he has repudiated it, and therefore it is absolutely void. In order to have his name removed from the list of contributories, it is not necessary to have the transferor before the court.

Re Commercial Bank Corporation of India ; Wilson's case, L. Rep. 8 Eq. 240; 21 L. T. Rep. N. S. 164;
Re Joint Stock Discount Company ; Fyfe's case, L. Rep. 4 Ch. 768.

Montague Cookson, for the official liquidators.—If Mr. Bentinck had come, before the winding-up of the company, or immediately on his attaining twenty-one, and had then repudiated the shares, he would have got rid of his liability, because a *restitutio in integrum* might have been effected—another transferee might have been found. But here the repudiation did not come until after the company was ordered to be wound-up, when this

restitutio could not be effected. He allowed the creditors, that trust to the register, to believe he was a shareholder. And in cases of such misrepresentation, courts of equity have held the infant bound, where there could be no *restitutio in integrum.*' Lord Chancellor Cowper says: "If an infant be old enough and cunning enough to continue and carry on a fraud, he ought in a court of equity to make satisfaction for it." And in a bankruptcy case, where an infant held himself out to be *sui juris*, and traded in that character, the court would not assist him.

Ex parte Watson, 16 Ves. 265.

Moreover, Mr. Bentinck's name cannot be removed from the list, unless Mr. Gray be brought before the court.

The following cases were cited:

Money v. *Jorden*, 21 L. J., N. S., Ch. 531;
Wright v. *Snowe*, 2 De G. & Sm. 321;
Overton v. *Banister*, 3 Hare 503;
Vaughan v. *Vanderstegan*, 2 Drew 408;
King's case, 3 De G. & J. 63;
Read's case, *supra*, p. 10.

Lord ROMILLY:—

It is quite settled that an infant cannot be made a shareholder. It is no contract at all, unless after he comes of age he does some act to affirm or to confirm it. Mr. Cookson has put this case, as if it were a case which was like bankruptcy or felony. Bankruptcy depends entirely on statute. As to felony of course an infant can commit felony, or commit fraud, or commit a robbery. It is no excuse to say "I am a boy of seventeen," when he is brought up: it is no excuse to say that he was an infant at the time, if he was old enough to know what he was about. No doubt he would be liable for the fraud he has committed, or for the crime he has committed. That is perfectly dictinct, and the statutory provisions made the distinction in cases of bankruptcy. There are several cases, where the act which has been done has been considered in the nature of a felony, or in the nature of a crime; but that does not apply to an infant where he has taken shares or has accepted an interest. The distinction is perfectly plain. Here the fraud is not committed against the company, or against any particular person. It is a fraud that is committed, if an infant goes and sells shares to a transferee and tells him positively "I am of age, and I can prove to you I am of age," and induces him thereby to take the shares. That is a different case; but on his merely taking shares in the company, is the company bound to see that he is of proper age? In all the cases that have come before me I have always taken the infant's name off upon the mere proof of his being an infant. If Gray were here, there is no question that Bentinck would be taken off and Gray put on. Does his absence make any difference? It makes this difference, that he might require strict proof that he was an infant at the time. That proof he is entitled to have, but he is entitled to nothing further. I think, as Bentinck repudiates the contract, he cannot claim any benefit under it, and he must repay the sums of money he has received. It is not a case in which I can give any costs. It is not a case I can look upon with any favour; but it is the case of an infant being made a partner, which the liquidators are not able to maintain. Therefore I shall make an order that his name be struck off the list, and that he repay the three sums of 1*l.* 8*s.* 9*d.* each, and no costs shall be given to him.

Solicitors for Mr. Bentinck, *Duncan* and *Murton*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

Oct. 27 *and* 28, *and Nov.* 26, 1873.

DYMOCK'S CASE.

Company—Winding-up—Contributory—Bonâ fide transfer—Misrepresentation as to position of transferee, and as to consideration—Transfer set aside and transferor placed on the list of contributories.

In a company, being a common law partnership, where the shareholders had power to transfer their shares on the proposed transferee being approved of by the directors, a shareholder, at a time when the company was failing, directed his broker G. to dispose of 1200 *shares, and G. communicated with another broker S. who supplied the name of M. A notice of the intention to transfer in consideration of* 5*l. was sent to the company by the broker S., and the transferee M. was described by S. as "holding a good position in society, as the property he resides on yields to his wife and himself jointly about* 450*l. a year." The transferee was thereupon approved of by the directors, and a formal transfer was subsequently executed. It turned out that M. the transferee had no means, except the money that was allowed him by his wife, and that instead of* 5*l. having been paid by the transferee, he had paid nothing, but S. the broker had been paid* 60*l. on the completion of the transaction. In the winding-up of the company, it was*

Held on the evidence that S. the broker was an agent for the transferor, and that the transfer had been obtained by the misrepresentations of S., and that the transferor must be placed on the list of contributories in respect of the shares.

THIS was a case similar to *Mushet's case*, in which the official liquidators of the European Society sought to set aside a transfer.

The society was established under a deed of settlement dated the 2nd Sept, 1854, and was subsequently registered under the Registration Act 1844 (7 & 8 Vict. c. 110), and also under the Companies Act 1862.

It was provided in the society's deed of settlement, that a shareholder who wished to transfer his shares, shall send to the society a notice of his wish, and should describe in the notice, "the full name and profession or calling, and place of abode of the proposed shareholder;" and on the approval of the proposed shareholder by the directors, he might transfer his shares: (clause 96, *vide sup.*, p. 11.)

In Oct. 1870, at a time when the society was reported to be in an insolvent condition, Mr. Dymock, who held 1200 shares in the society, applied to a Mr. Gilmour, a broker of Edinburgh, to get rid of the shares. Mr. Gilmour put himself in communication with Mr. Robert Stewart, another broker of Edinburgh, and Mr. Stewart supplied the name of Mr. Müller as being willing to purchase the shares.

On the 19th Oct. 1870, a formal notice was sent to the society of the intention of Mr. Dymock

to transfer the 1200 shares to Charles William Maxwell Müller, of Glenyards, Greenhill-by-Denny, Stirlingshire, in consideration of 5*l.* This notice was sent to the society by the broker Mr. Stewart, inclosed in the following letter:

Edinburgh, 19th Oct. 1870.

Dear Sir,—I inclose notice of transfer and certificates for 1200 shares now standing in the name of William Dymock, Linlithgow, N. B. merchant, which I will thank you to order transfers of in favour of Charles William Maxwell Müller, Glenyards, Greenhill-by-Denny, Stirlingshire. This gentleman is a particular friend of my own, and holds a very good position in society, as the property he resides on yields to his wife and himself jointly about 450*l.* a year. I am confident that he will work with the directors and ourselves in upholding the company. ROBERT STEWART.

H. P. Parminter, Esq.,
Manager, European Society.

Mr. Müller was approved of by the directors as a transferee on the 1st Nov. 1870, and on the same day a form of transfer was sent by the society to Mr. Stewart. Thereupon he wrote:

Edinburgh, 2nd Nov. 1870.

Dear Sir,—I am obliged by your favour of the 1st inst., along with transfer of 1200 shares, Dymock to Müller, and which I have already sent off for the signature of the seller. The moment it is completed I will send in the deed for registration.

ROBERT STEWART.

Dalton Easum, Esq., Secretary, European Society.

Mr. Stewart forwarded the form of transfer to the other broker, Mr. Gilmour, who sent it on to Mr. Dymock with the following letter:

2nd Nov. 1870.

Dear Sir,—I send you herewith transfer of your 1200 shares in the European for your signature. I do not know how Stewart has managed to get this passed. Of course it will be best to say nothing about it. In the meantime get it sent in as soon as possible to get it through, and get quit of any further responsibility. Please sign and return the transfer without any delay. The 60*l.* I will not pay to Stewart until I get evidence that the thing is properly carried through. I must see the certificate before I pay anything. In the meantime please send me 60*l.* HUGH GILMOUR.

Wm. Dymock, Esq.

And on the following day he wrote again:

3rd Nov. 1870.

Dear Sir,—I have your favour of yesterday's date with transfer of European shares. Also draft for 60*l.* sterling. I shall endeavour to see that everything is properly transferred, so far as possible. I must see the certificate, of course, to Müller, before I pay the money to Stewart. HUGH GILMOUR.

Wm. Dymock, Esq.

The transfer was executed by Mr. Dymock and by Mr. Müller, and bears date the 3rd Nov. 1870. It was on that date sent to the society by Mr. Stewart, and on the 8th Nov. 1870, certificates of the shares in favour of Mr. Müller were sent by the society to Mr. Stewart; and Mr. Müller was placed on the register as the proprietor of the shares.

The order to wind-up the society was made on the 12th Jan. 1872, and in the winding-up the official liquidators applied that Mr. Dymock should be placed on the list of contributories in lieu of Mr. Müller, on the ground that, instead of 5*l.* being paid by the transferee for the shares, 60*l.* had been paid to Mr. Stewart for getting rid of them; and further, that there had been misrepresentation with respect to the position of the transferee; for it turned out that he was a person without any means except what he received from his wife. Since the execution of the transfer he had separated from his wife, and his only means of living were derived from an alimentary allowance of 120*l.* a year, paid to him out of her income for the support of himself and his children, and determinable at her pleasure.

The law agent of Mr. and Mrs. Müller stated in his affidavit: "Mr. Müller in 1869-71 carried on the profession of musical teacher in London, where he was also manager of a bleach works, and Mrs. Müller resided at Glenyards; Mr. Müller came to Glenyards, whenever he had holidays. . . . He always came for about three months in the autumn, and at Christmas for about a month. . . . Mr. Müller held a good position in society; the property he resided on, together with other real estate, to which he and his wife were entitled, yielded to them jointly 450*l.* a year and upwards."

Mr. Dymock stated in his evidence, "that he was entirely ignorant of the arrangement made between Mr. Stewart and Mr. Müller, and that he was neither party nor privy to the representations made by Mr. Stewart to the directors."

Mr. Müller stated in his evidence: "In 1870, Mr. Stewart represented to me that he was the holder of upwards of 2000 shares in the European Society, and that he was desirous of acquiring more shares therein, but did not wish his name to appear in the application for such shares, as he was already a large holder; and he requested me to pay some of the shares held by him into my name temporarily. . . . . On his assuring me that I should run no risk whatever, I ultimately consented. . . . . On the 2nd Aug. 1870, I attended at Mr. Stewart's offices, when he produced a printed transfer, which he assured me was for 1200 shares from his name into mine. . . . . I then and there signed the transfer. It was never agreed between me and Mr. Stewart that I should pay anything for the shares, nor even that I should become the proprietor thereof."

Napier Higgins, Q. C., and *Montague Cookson*, for the official liquidators.—Stewart was in reality the agent of the transferor; he was paid 60*l.* for the transaction, and only when the transaction was completed. The misrepresentations made by Stewart are in effect misrepresentations of the transferor. The whole transaction was an arrangement between the parties for shifting the liability from a solvent to an insolvent person; and the transferor ought not to have the benefit of such a fraud.

H. M. Jackson, Q. C., and *Bolland*, for Mr. Dymock.—Stewart was not the agent of the transferor. The transferor's broker, Gilmour, sold the shares in open market to Stewart. The transferor was wholly ignorant of any misrepresentation made by Stewart. And in fact there was no misrepresentation. Müller did hold a good position in society; and with regard to the 5*l.* stated in the transfer as the consideration, it was perfectly clear that for 1200 shares this was a nominal consideration.

Napier Higgins, in reply.

Judgment was reserved.

Wednesday, Nov. 26, 1873.

Lord ROMILLY:

This case is of the same description as *Mushet's case* (*sup.*), only that it is rather stronger. It introduces again Mr. Robert Stewart. Mr. Dymock was the registered proprietor of 1200 shares. In October 1870, he employed a broker of the name of Gilmour to get rid of his shares. Mr. Gilmour applied to Mr. Robert Stewart for

this purpose. Mr. Stewart professed to sell them to one Müller. Notice of transfer was signed by Robert Stewart, and forwarded by him to the society, together with the certificates of the 1200 shares, and a letter addressed to the manager in these words:—

Dear Sir,—I enclose "notice of transfer" and certificates for 1200 shares now standing in the name of William Dymock, Linlithgow, N.B., merchant, which I will thank you to order transfers of in favour of Charles William Maxwell Müller, Glenyards, Greenhill-by-Denny, Stirlingshire. This gentleman is a particular friend of my own, and holds a very good position in society, as the property he resides on yields to his wife and himself jointly about £450 a year. I am confident that he will work with the directors and ourselves in upholding the company.—Yours truly,

ROBERT STEWART.

This notice and letter were taken into consideration, and upon the representations of Mr. Stewart the transfer was approved. By this communication it would appear that 5*l.* was paid for the consideration; but the fact was that Mr. Dymock was to pay Mr. Stewart 60*l.* as a bonus for getting rid of the shares. Mr. Stewart is dead.

The whole transaction appears to me to be a fraudulent attempt to get Mr. Dymock's shares transferred out of his name to Müller, a person who is wholly incompetent to pay. Mr. Stewart's letter to the manager is an instance of the misrepresentation. Mr. Stewart was, in my opinion on the evidence, the agent of Mr. Dymock. He induced the society to transfer the shares to Müller by clear misrepresentations. The premium for disposing of his shares was, as in *Mushet's* case, received and disposed of by Stewart. Müller had no property, and the directors, if properly informed, would have rejected him as a transferee. The case, in my opinion, bears investigation in no part of it, and the result is that the transfer is worth nothing, and that Mr. Dymock's name must be replaced on the register for the whole 1200 shares, and he must pay the costs.

Jackson.—May I ask that the order may be without prejudice to any remedy Mr. Dymock may have against the estate of Mr. Stewart, and against Mr. Müller? That is necessary under the Act of Parliament.

Lord ROMILLY.—If so, you may take that as part of the order.

Solicitor for Mr. Dymock, *Wynne*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

June 18, *and Oct.* 28, 1873.

JOSHUA MURGATROYD'S CASE.

Company—Winding-up—Contributory—Bonâ fide transfer — Duties of transferor. — Validity of transfer.

In a company, being a common-law partnership, where the shares are transferable on the proposed transferee being approved of by the directors, if a shareholder transfers his shares to a person who he knows is unable to discharge the obligations of a shareholder, the transferor will not be sheltered by the fact that the directors neglected to inquire and were satisfied with the transferee, the transfer will be set aside, and the transferor's name placed on the list of shareholders.

THIS was a case as to an incomplete transfer of shares.

The case had been ordered to stand over for the purpose of producing the two transferees of the shares, with liberty to the applicant to pay the calls thereon within three weeks: (*Vide Joshua Murgatroyd's Case, sup.*, p. 115.) The calls, together with interest, amounting to 375*l.* and 49*l.* 5*s.* 5*d.*, respectiveiy, were accordingly paid on the 20th Feb. 1873, and the transferees had been served with notice of the application. One of them had become bankrupt, and the other did not now appear.

Instead of a consideration having been paid by the transferees, 10*l.* had been paid to each of them by Mr. Clegg, the sharebroker.

Jackson, Q. C. and *Henderson*, for Mr. Murgatroyd.—The clauses of the deed of settlement (*sup.* p. 11), relate only to the name, &c., of the transferee, they have no reference to the consideration. Although 10*l.* was paid to each transferee, the directors were not concerned with any mis-statement of the consideration. With regard to the transferees, the directors having neglected to express their disapproval within fourteen days, must be taken to have approved them; moreover they subsequently expressed their willingness to register the transfer on the payment of the call, which has now been paid. Thus Mr. Murgatroyd is now entitled to the same rights as Mr. Bentinck, whose name has been removed from the list of contributories (*Bentinck's Case, sup.* p. 99.)

Napier Higgins, Q. C., and *Cookson* for the official liquidators.

Lord WESTBURY.—

You see I have to deal with a case in which there are facts full of suspicion, most suggestive of some dishonest purpose. The first fact is, that this is not a *bonâ fide* sale, at all; but Mr. Murgatroyd goes into the market and he bids for an assignee of his shares, and he finds two people ready to swallow the bait, if the hook is baited with 10*l.* apiece. Now, is the power given to a shareholder to transfer his shares in the company intended to be applied to the working out of such an arrangement as that?

Jackson.—One of the transferees was the company's own agent, and it is now admitted that the transfers were out and out.

Lord WESTBURY.—That is nothing at all. The company may have had a very dishonest or an insolvent agent. With regard to the transfers being out and out, I have no doubt that they were so. In these transactions, many of which have been argued before me, a view of the case has been taken, in which they thought the man who transferred, and the man who received, were liable to do nothing more than abide by the letter of the rule, and that anything that was beyond the letter he was not under an obligation to regard. Now if we live long enough, we shall find cases of that kind arising again and again. We shall have sets of judges convened in one tribunal, in which one will be content with the observance of the letter, and the other will insist that, if the letter is observed, the spirit will be broken and violated, and the greatest injustice will be done. Now here you have got this case. I will give you an opportunity of getting out of it, if you can honestly. We will suppose that Mr. Murgatroyd may have had a panic, and that he went into the market and baited his hook for persons to relieve him, and that he gave to one 10*l.* to stand in his shoes, and to another 10*l.* He might have done that probably.

If he told the truth, we should have had to consider whether that was consistent with the purposes of the power of transfer. But you see he not only did that, but he sent in their names. Now what I want parties in this predicament to observe, is this. Originally we know a shareholder in a company, the man who had a share in a business or partnership, had no power of transferring that share. The Legislature came to the relief of that, and it said, you shall have a qualified power of transfer, but a power of transfer clogged with such conditions and qualifications as will be sufficient to prove, if they are observed to the company and to your brother shareholders, that the persons yon represent as fit recipients of their shares are fit persons to enter into partnership with them. Now I particularly want to have this observed, that a provision of that kind is something more than describing certain regulations and checks upon a transfer; it is a provision that contains within itself in reality a contract between all the shareholders, that one of the bases of their partnership shall be that no shares shall be transferred, except in conformity with the spirit of that power. And, therefore, if a man, being a shareholder, sends in another's name, and he knows in his conscience that that other is not a person coming within the description of the transferee intended to be accepted, but by some lucky chance the blot is not hit, and the evil is not discovered, and the transfer is passed, and the new name is put in lieu of the old—yet if I can afterwards find that he knew of the impropriety of the name he sent in, if I can fasten on him any knowledge that the intended transferee was not a person that answered in every respect the spirit of the enactment, I will, if it comes before me, undo the transaction and compel him to resume the place from which he hoped to escape by that device. The device may not be discovered, the latent fraud may not be made known; but if at any time afterwards that latent fraud can be unveiled and brought to the light of day, the transaction shall be undone. Now then, will you accept that condition, and will you make an affidavit fully detailed to prove to me that at the time, when you sent in these two names, you personally knew they were men of substance, men of good character, men of a position in life to make them fit persons to stand in your shoes, to fulfil the obligation that you were under? . . . . With regard to the transaction being effected through a broker, what the broker did Mr. Murgatroyd did, and if he gave the broker unlimited licence, and the broker did more than he himself would have done, he shall answer for the broker. . . . . If the directors did not do their duty, or if they made a rash representation, it shall not shelter Mr. Murgatroyd, if he has done that which is wrong. I will take it much higher up. Mr. Murgatroyd shall not put himself under the cloak of the directors, unless they are directors who are vigilant, honest men, and who have been unable to discover these facts. If Mr. Murgatroyd knew them, and did not tell them, he shall not derive the smallest possible benefit from the fact that the directors gave him this assurance or the other assurance, and thereby were content with the transaction. . . . Just consider this. Suppose every judge had insisted on perfect faith being observed in this matter, and had held out to the shareholders: "Now, remember you shall not hide yourselves under this man's neglect or that man's collusion; nothing shall stand the test of inquiry, but that which is honest and true." Observe how these companies have been filled with rotten bankrupt people, how the unfortunate creditors, who trusted them and trusted the conduct of the directors, have been betrayed. The company breaks up, and they find a number of men of straw, that have been brought into the company in this way, who are unable to fulfil any part of the engagement; some few are able, others are unable; and that originates in the neglect of judges to watch over these transactions, and to hold out strongly that they will undo everything that is not consistent with the purest reasons for transferring the shares, and the belief of the transferor, that the man he puts in his shoes will be as competent and able as he himself is, or more so—will be fully competent to discharge the obligations of his situation. You would not wish to weaken that rule. If I am hard on Mr. Murgatroyd, I am hard because I derive conclusions from his own conduct, which is open to every doubt and suspicion, which is fortified by an attempt to take a circuitous route in getting rid of these shares, and prevent the discovery of the utter incompetency and insufficiency of the man that he put in. I will let the application stand over, with liberty to apply again on such a ground as you may bring forward on or before the 1st of August. The matter stands over for further proof to be adduced by the petitioner.

Oct. 28.—Mr. Murgatroyd said, in his affidavit:—"I instructed Mr. Clegg, as a broker, to dispose of the 500 shares which I formerly held in the society, in the ordinary course of his business, but it was not with the view of fraudulently shifting the liability in respect of such shares to improper or indigent persons. At the time I executed the deeds of transfer of the 1st Oct. 1869, I believed that the transferees, Philip Barker and Robert Marshall, were men of substance, fit and proper persons to be shareholders in the society, and capable of discharging all claims upon them as such." On cross-examination he said:—"I paid Mr. Clegg 62*l.* 10*s.* for the transaction of selling; he said it would cost him that. I knew nothing of Barker or Marshall personally. I swore I believed them both to be men of substance, because Mr. Clegg told me they were."

Mr. Clegg, the share broker, stated in his affidavit: "The transfers were *bonâ fide* transactions, and were not entered into with any fraudulent intent of getting rid of the liability of the shares, which were sold by me in the ordinary course of my business as a broker, the transferees having applied to me in the first instance without any solicitation on my part. At the time the deeds were executed, I believed Philip Barker and Robert Marshall to be men of substance, fit and proper persons to be shareholders in the said society, and capable of discharging all liabilities in respect of these shares."

On the case being again argued, judgment was given by

Lord ROMILLY.—

I think I must keep Mr. Murgatroyd's name on the list. It is clear to me that he has not complied with Lord Westbury's requisition, which settled that he must show they were fit persons who were to be substituted in his place; and he is bound, according to that decision, to remain on

the list. It is quite clear that Barker and Marshall were not fit persons I am not at all clear that Murgatroyd knew it. That I am not clear about; but I think that Clegg either knew, or might easily have known, if he had taken pains to inquire, that they were neither of them fit persons; and therefore I do not allow the transfers to them.

Solicitors for Mr. Murgatroyd, *Sladen* and *Mackenzie*.

Solicitors for the official liquidators, *Mercer* and *Mercer*.

Oct. 28, 29, 30 *and* 1873; *Jan.* 9 *and Feb.* 2, 1874.

PHILLIPS'S CASE.

Company—Winding-up—Contributory—Bonâ fide transfer—Misrepresentation—Gentleman—Whole of the consideration not actually received by the transferee—Onus probandi on transferor—Transfer set aside and transferor placed on the list of contributories.—Validity of transfer.

P. held shares in a company, which was a common law partnership, where the shareholders had power to transfer their shares on the proposed transferee being approved by the directors. At a time when his company was reported to be failing, he directed his solicitor to dispose of his shares: his solicitor communicated with a share-dealer, B., who supplied the name of "G., a gentleman," as being willing to take the shares. The solicitor sent in the name of G. who was thereupon approved by the directors; and a transfer was executed to him by P., the consideration being stated as 29l. 10s. paid by the transferor to the transferee. The transfer was registered, and within two years the company was ordered to be wound-up. It then appeared that G., the transferee, was a pauper; and that though he had received the cheque for 29l. 10s. and had indorsed it, yet he had not had the whole of the 29l. 10s., for 10l. of it had gone to the transfer clerk of the company, 7l. 15s. to G. the transferee, and the rest to B. the share dealer and his clerk. On the application of the official liqaidators to place P. the transferor on the list of contributories in respect of the shares, it was

Held that, inasmuch as the onus was on the transferor to show that everything that is material for the decision of the directors has been carefully brought to their attention, and as that had not been done here, the transferor must be placed on the list in lieu of G.

Quære, whether a person may not speculate bonâ fide in shares that are worth less than nothing, in the hope that something may come out of them, without there being any risk of the transfers to him being invalidated.

THIS was a case in which the official liquidators of the European Assurance Society sought to set aside a transfer of shares.

The society was established under a deed of settlement, dated the 2nd Sept. 1854, and was subsequently registered under the Registration Act of 1844 (7 & 8 Vict. c. 110), and also under the Companies Act 1862.

It was provided in the society's deed of settlement that a shareholder, who wished to transfer his shares, should send to the society a notice of his wish, and should describe in the notice the full name and profession or calling and place of abode of the proposed shareholder; and on the approval of the proposed shareholder by the directors he might transfer his shares: (Clause 96, *vide sup.* p. 11.)

In 1870 the society was generally reported to be in an insolvent condition; and Mr. Phillips, a medical officer of the society, wished to dispose of the 590 shares that he held in the society. Having made arrangements for doing so, he wrote to the secretary as follows:

2nd July 1870.

My dear, Sir,—I have decided on selling my shares in the European to Mr. Thomas Roberts, of the Grange, Walham-green, Fulham, builder, and shall feel obliged by your letting the bearer have a proper form of transfer for me to fill up. I shall be prepared to pay up the remainder of my call on the transfer being registered in the usual way. Very truly yours, RICHD. PHILLIPS.

D. Easum, Esq., Secretary.

The name of Mr. Roberts was approved by the directors, and a transfer prepared in the office, and the certificates sent to the society; but the transaction was never completed, in consequence of Mr. Roberts becoming insolvent. Accordingly Mr. Phillips instructed his solicitors, Messrs. Rivington, to get the shares sold. They applied to Mr. Bensusan, a share dealer, who subsequently sent them the name of George Gilbert as being ready to purchase the shares at 27*s.* 6*d.* discount, 26*s.* 6*d.* having been paid on each. Mr. Bensusan also told Messrs. Rivington that George Gilbert was then a shareholder in the Society, and was residing at 135, Stamford-street, Blackfriars-road, and that he had for many years previously resided at 152, York-road, Lambeth, his name appearing both in the court and street directory under those address; that he was of no occupation or business, having been formerly a coach proprietor.

Accordingly, on the 13th Aug. 1870, Messrs. Rivington sent to the Society a letter, in which they stated that the contemplated transfer to Roberts had been abandoned, and that they enclosed a notice of a proposed transfer of the shares to George Gilbert "in consideration of 29*l.* 10*s.*, to be paid to the transferee." The transfer notice stated that the consideration was "29*l.* 10*s.* paid by me," (the notice being signed by Mr. Phillips); and that the proposed transferee was "George Gilbert, of 135, Stamford-street, Blackfriars-road (late of York-road, Lambeth), gentleman."

Subsequently Mr. Phillips wrote as follows to the Secretary:

19th Aug. 1870.

My dear Sir,—I have found a much better man to whom to transfer my shares than the Mr. Roberts whom the directors have approved of as my transferee, *i.e.*, one who is pecuniarily more substantial. Will you kindly ask the board to accept this gentleman in lieu Mr. Roberts; otherwise I must complete the arrangements with him before I leave town to join my family.

I shall also be glad if you will kindly forward me a cheque for the last two quarters' salary, due at Midsummer last. RICHARD PHILLIPS.

D. Easum, Esq., Secretary.

The secretary replied:

23rd Aug. 1870.

My dear Sir,—With reference to your application for transfer of shares in this society, I am desired to inform you that until the appeal petition of Mr. Crowe for the re-hearing of his petition is disposed of, it cannot be entertained. DALTON EASUM, Secretary.

Richard Phillips, Esq.

A few weeks after, the proposed transferee was approved by the directors, a transfer deed was executed by Mr. Phillips at the office of the society, and he was informed by the transfer clerk

that Gilbert would be required to attend at the office to execute the transfer, and that the consideration money should then be paid.

On the 19th 1870, Messrs. Rivington sent to Mr. Bermingham, the transfer clerk, a cheque for 29*l.* 10*s.* "for Mr. George Gilbert." The transfer clerk replied:

21st Nov. 1870.

Gentlemen,—In compliance with Mr. Phillips's wish, and with reference to your favour of yesterday, I have to-day handed Mr. Gilbert your cheque for 29*l.* 10*s.*, obtaining his signature to the transfer and receipt for consideration on the deed also.

Messrs. Rivington. GEO. R. BERMINGHAM.

The name of George Gilbert was thereupon entered on the register as the owner of the 590 shares.

On the 12th Jan. 1872, the society was ordered to be wound-up; in the winding-up the official liquidators applied to have Mr. Phillips placed on the list of contributories in lieu of George Gilbert. For it turned out that George Gilbert, the transferee, had formerly been a coach proprietor and driver, but having become blind, he was in 1870 wholly without means and without occupation. He had been induced by Mr. Bensusan, the sharebroker, to sign several transfers of shares in consideration of receiving a few pounds on each occasion, Mr. Bensusan telling him that the shares might be great things some day: (*Vide sup.*, p. 125.)

Though the cheque was made to the order of George Gilbert and indorsed by him, he did not get the whole of the 29*l.* 10*s.*; the cheque was cashed by a friend of Bermingham's; and Bermingham now admitted that he received a portion of the money as a part of the "commission" received by Bensusan; and it appeared from Bensusan's evidence that the money was divided in this way: 10*l.* was paid to Bermingham, the transfer clerk; 7*l.* 15*s.* to George Gilbert, the transferee; 9*l.* 15*s.* to Bensusan, the sharebroker; and 2*l.* to his clerk.

Mr. Phillips and Mr. Rivington never at any time knew or saw either Bermingham or George Gilbert; and previously to these transactions they were both equally unacquainted with Bensusan. Mr. Rivington, the transferor's solicitor, stated in his affidavit:—"I had every reason to believe, and I did believe, that the whole sum of 29*l.* 10*s.* paid by me to George Gilbert belonged to and was retained by him. No arrangement whatever for the division of the said sum of 29*l.* 10*s.* between or amongst any person or persons whomsoever was ever made or came to with my concurrence, privity, or knowledge."

Napier Higgins, Q.C. and *Montague Cookson* for the official liquidators.—The transaction was not a *bonâ fide* one. It was merely a device for getting rid of Phillips's responsibility. The proposed transferee was misdescribed.

Lord ROMILLY.—It is a serious penalty to make a man pay all the calls for calling another a gentleman. You had better leave out every consideration of that sort.

Napier Higgins.—At any rate, Gilbert was a person whom the directors, if they had known all about him, ought not to have accepted as a shareholder. But they did not know about Gilbert, because they were misinformed by the agents of Phillips. For Rivington and Bensusan were both in reality agents of the transferor. And with regard to the consideration money, the directors did not know that it was to be shared with one of their own officers. The onus lies on the transferor to show that the directors knew everything that it was material for them to know about the transferee. And even if they had known, no benefit could arise to Phillips from a disregard of duty by the directors. It cannot be said that the shareholder had an absolute uncontrolled right to transfer. Any fraud on the part of the transferor, or any ignorance in the directors of what it was material for them to know, or any neglect of duty by the directors, will vitiate the transfer. Moreover, this company is still to a certain extent governed by the Act of 7 & 8 Vict. c. 110; no creditor can be affected by a transfer of a share until it is registered in the manner required by that Act.

Southgate, Q.C. and *Millar* for Mr. Phillips.—The 7 & 8 Vict. c. 110 is repealed, and, consequently, cannot be applicable to this company. Moreover, Mr. Phillips did not become a shareholder until 1865. With regard to the transfer, the law is that, if you, without fraud, transfer your shares before the presentation of the petition to wind-up, although you do it with the intent of avoiding liability in future, the transfer cannot be impeached. You have nothing to do with what the directors do or omit to do. Here the transfer was perfectly *bonâ fide* and without fraud. The shareholder instructed his solicitors to sell the shares, and they instructed a share dealer to find a purchaser. The purchaser, whose name was supplied, was wholly unknown to the transferor and to his solicitors. He was approved by the directors, and the transfer was completed. The consideration was paid to the transferee; and when the cheque reached his hands, it was wholly in his control; the transferor is not responsible for the use subsequently made of the money by the transferee. The arrangement for the division of the consideration money was wholly unknown to the transferor. [Lord ROMILLY.—I held in *Mushet's* case, and I stated my intention always to hold in all these cases, that the burden of proof is upon the transferor, and he must prove that the whole money was paid to the transferee.]

The following cases were cited during the argument:

Lund's case, re Mexican and South American Company, 27 Beav. 465; 33 L. T. Rep. 85;
De Pass's case, re Mexican and South American Company, 4 De G. & J. 544; 33 L. T. Rep. 322;
Hyam's case, re Mexican and South American Company, 1 De G. F. & J. 75; 1 L. T. Rep. N. S. 115;
Chinnock's case, re Athenæum Life Assurance Company, Johnson 714; 1 L. T. Rep. N. S. 435;
Costello's case, re Mexican and South American Company, 2 De G. F. & J. 302; 3 L. T. Rep. N. S. 421;
Budd's case, re Electric Telegraph Company of Ireland, 3 De G. F. & J. 297; 5 L. T. Rep. N. S. 332;
Weston's case, re Smith, Knight, and Company, L. Rep. 6 Eq. 238, 4 Ch. 20; 19 L. T. Rep. N. S. 337;
Williams's case, re Imperial Mercantile Credit Association, L. Rep. 9 Eq. 225;
Harrison's case, re Bank of Hindustan, China, and Japan, L. Rep. 6 Ch. 286; 24 L. T. Rep. N. S. 691;
Master's case, re European Bank, L. Rep. 7 Ch. 292; 25 L. T. Rep. N. S. 582;
Lloyd's case, sup. p. 25;
Richard Williams's case, sup. p. 84;
Walton Williams's case, sup. p. 125;
Read's case, sup. p. 10;
Mushet's case, sup. p. 139.

Monday Feb. 2.

Lord ROMILLY (having stated the facts).—

I said when this case was heard, that if all these facts had been stated to the directors, and they had thought fit to pass the transfer in

the *bonâ fide* discharge of their office, no complaint could afterwards have been made. But when the sum of 29*l.* 10*s.* is parcelled out to the various actors in the transaction, and the whole of this concealed from, or at least not disclosed to, the directors, though known to the transfer clerk, who was one of the principal sharers in the booty, I am of opinion that the transaction is a fraudulent mode of getting rid of the shares, and that it cannot stand. By fraudulent transaction, I do not mean that Mr. Phillips is guilty of any direct fraud; he employed a respectable solicitor to get rid of his shares. The solicitor inquires who is the sort of person he can get to sell the shares; he is recommended to Mr. Bensusan, who undertakes the transaction and negotiates the transfer of shares, and employs the person to obtain and distribute the money. By saying this is a fraudulent transfer, and one which cannot stand, I do not mean to impute to Mr. Phillips, or to his solicitor, any wilful connivance with the transaction or knowledge of what was done. But they wilfully shut their eyes, they employ Mr. Bensusan without inquiry, and allow him and two or three associates to manage the whole transaction; the result of which is, that without inquiry they are satisfied with the nominal sum of 29*l.* 10*s.* being handed to Mr. Gilbert, although, in truth, the greater part of it was divided between Mr. Bensusan and Mr. Bermingham, the transfer clerk, without the knowledge of the directors, and nothing about it appearing on the books of the society. I repeat what I said when the case was heard, that, though I disapprove of the practice of throwing the debts of the company on the remaining shareholders, yet I do not mean to lay down that, where a person seeks to speculate in shares that are worth less than nothing in the market, in the hope that something may ultimately come out of them, he may not do so. I repeat that, in all such transactions, in order to make a valid transfer, which shall bind the shareholders of the company, who trust their affairs entirely to the directors, it is essential that the full transaction shall be laid before the directors in all its details, and that no officer of the company, particularly one so important as the transfer clerk, who has the care of the books, shall have any pecuniary advantage arising from it. These transactions are very complicated; and it is the object of the persons who are engaged in them to mix them up in such a manner that it is very difficult to unravel them. It is for this reason I have stated that the burden of proof in them—in which I have followed Lord Westbury—lies upon the transferor; and that it is his duty to show that everything that is material for the decision of the directors has been brought carefully to their attention; and in my opinion that has not been the case here, and therefore I disallow the transfer.

Solicitors for Mr. Phillips, *Rivington* and *Son*.
Solicitors for the official liquidator, *Mercer* and *Mercer*.

Thursday, Oct. 30, 1873.

Lord Digby's Case.

Company—Amalgamation of companies—Winding-up—Contributory—Amount of call—Return of capital.

On the transfer of the N. Company's business to the E. Society, it was arranged that the E. Society should take over the property and business of the N. Company, and should pay to each shareholder in the N. Company his original paid-up capital upon each share in full, or at his option should allot to him E. Society's shares in lieu of his N. Company's shares. A shareholder in the N. Company, on whose shares of 25l. each, 5l. had been paid up, elected to take cash in respect of them. In the subsequent winding-up he was placed on the list of contributories; and it was

Held that the payment of 5l. per share was in effect a return of the capital to him: and that, in a call of the whole of the unpaid capital, he was liable to contribute the full 25l. per share.

This was a question as to whether there had been in effect a return of capital.

In 1866 the Royal Naval, Military, and East India Company Life Assurance Society transferred its business to the European Assurance Society (see *Lancey's case, sup.* 16, 17). The arrangement was carried into effect by two deeds dated the 17th Sept. 1866. By one of these the European Society, *inter alia*, covenanted to

Pay to each shareholder of the Royal Naval Society his original paid-up capital upon each share in full, but without bonus, by two equal instalments at six and twelve months respectively, computed from the day of the dissolution of the Royal Naval Society, with interim interest from that date at the rate of 5 per cent. per annum.

Each shareholder, however, was to have the option, to be exercised within six months of the dissolution, of taking up his paid-up capital in shares of the European Society upon certain terms.

Lord Digby held twenty-five shares of 25*l.* each, on which 5*l.* had been paid up. And in Oct. 1866 he received a circular, that was sent by the Royal Naval Society, to its shareholders, stating:

1. You are entitled to take shares in the European Assurance Society of 2*l.* 10*s.* each, with 10*s.* 6*d.* per share paid up, and your dividend thereby will be on the sum of *l.* Or, 2. You are entitled to receive the sum of *l.*, being the amount originally paid up on your shares in two instalments, viz.: one half in six months and one half in twelve months, from the 17th Sept. last, together with interest at the rate of 5 per cent. per annum.

A circular to the same effect was sent him by the European Society.

Lord Digby thereupon "elected to take cash in respect of his shares." He delivered up the share certificates to the European Society, and received from them the cash in two instalments. The following receipt was given by him:

Received this 28th May 1867, of the European Assurance Society, the sum of 65*l.* 12*s.* 6*d.*, being the amount of the first instalment of my original paid-up capital payable by them to me as the holder of twenty-five shares in the Royal Naval Society . . . pursuant to the provisions of a certain deed dated the 17th Sept. 1866 . . . with interim interest.

On the 1st March 1872, an order was made to wind-up the Royal Naval Society, and in the winding-up Lord Digby's name was placed on the list of contributories. A call of 7*l.* per share had been paid by him, and the whole of the share capital having now been called up, it was contended by Lord Digby that he was liable to contribute 13*l.* only per share, but the official liquidator contended that his contribution must be 18*l.* per share.

Napier Higgins Q.C. and *Montague Cookson* for the official liquidators.—There was in effect a return of capital to the shareholders; and those

shareholders, who divided among themselves the whole of their capital, so far as it represented the moneys which they themselves had paid up, must restore these moneys back to the fund which is liable to the creditors. Lord Cairns decided this in *Murrough* and *Chamberlain's cases* (16 S. J. 483). See also *Stringer's Case*; *Re Mercantile Trading Company* (L. Rep. 4 Ch. 475; 20 L. T. Rep. N. S. 591).

Millar for Lord Digby.—There was no return of capital. The 5*l.* per share was paid by an outsider to the several shareholders of the Royal Naval Society for taking over their interest in the business. This is quite clear from *Cardiff Coke and Coal Company* v. *Norton* (L. Rep. 2 Eq. 558, 2 Ch. 405; 9 L. T. Rep. N. S. 186; 14 L. T. Rep. N. S. 750). Moreover, Lord Westbury, in *Lancey's case* (*sup.* p. 15), was of this opinion, for he said there, "the liability of the shareholders in respect of those debts, which are so taken over, unquestionably remains." He did not contemplate the creditors' getting more capital than was liable to them at the time of the amalgamation. Further, what is to be done in the case of those who elected to take shares?

Napier Higgins in reply.—The arrangements in the *Cardiff Company's case* (*ubi sup.*) were wholly different. The only money paid in that arrangement was a sum of 1750*l.*, which was applicable and applied only in the payment of the debts of the transferor company. This distinction was pointed out by Lord Cairns.

Lord ROMILLY.—

I think that I cannot get over the observation of Lord Cairns in *Murrough's* and *Chamberlain's* cases, which I have read, and that is the view of the case that I must adopt. (*a*) On the whole, I think I may look at it as a representative case. Mr. Higgins told me there was an amount of 14,000*l.* depending on it, and therefore though I give Lord Digby no costs, I think it would be fair to allow him not to pay costs.

(*a*) "It startles me to find, if it can be done, that actual hard money (which every one might have had, unless he preferred investing his money in Albert shares as an alternative) can be given back, the whole of the paid-up capital repaid; that the man who has paid up the whole can be paid back the whole, and the man who has paid up the half can be paid back the half; and then that the result is not merely to put back into his pocket the whole that he has paid, but to exempt him from all future liability. It is the cleverest operation that was ever performed on a joint-stock company, if it is a good one. . . . A provision was made which I cannot look upon as otherwise than a provision for the return of capital; because what was agreed to was this: that after the confirmation of the agrement by general meetings, the Albert Company should pay back to every shareholder, *eo nomine*, the amount that he had paid upon his share or shares in the company. If that is not a return of capital, I do not know in what way a return of capital could be expressed. It is the most accurate expression of a stipulation for a return of his capital from the company, which was taking over all the funds of the company. It is true that that is coupled with an alternative, that he might have, if he preferred it, so many shares in the Albert, treated as shares with 3*l.* paid, as would be equivalent to the money he might otherwiee have, but every shareholder might have his money if so disposed; and therefore the option to take as an alternative Albert shares appears not to differ the case from the case where there is a stipulation to hand back pure money; it makes the shareholder in the Bank of London Company a purchaser, who is to return the money for so many shares in the Albert." —*Per* Lord Cairns in the *Albert Arbitration* (16 S. J. 483.)

Solicitors for Lord Digby, *Bennett, Dawson* and *Bennett.*

Solicitors for the official liquidator of the British Commercial Company, *Mercer* and *Mercer.*

Jan. 9 and Feb. 2.

LINES'S CASE.

Life Assurance Company—Amalgamation of companies— Winding-up — Novation of contract— Policy—Bonus circular—Advertisement for creditors—Knowledge of an advertisement for creditors in an old winding-up of his company, imputed to a policyholder — Policyholder held, after an amalgamation, to be a creditor, not of the transferor company, but of the transferee.

L. effected a policy of life assurance with the W. Company in 1854, *and paid the premiums thereon to the company from time to time down to June* 1862, *when the W. Company transferred its business to the B. Association. Circulars were then sent to the W. policyholders by the B. Association and by the W. Company, informing them of the transfer of business, and further stating that "the terms and conditions contained in the policies will remain unaltered by this arrangement."*

L. thereupon paid his premiums to the B. Association and accepted receipts from them until 1865, *when that association transferred its business to the E. Society. L. had no notice of this amalgamation, but he thereafter paid his premium to the E. Society and accepted receipts from them until* 1872, *when the B. Association and the E. Society were ordered to be wound-up.*

In 1867 *a reversionary bonus of* 1*l* 12*s, was declared by the E. Society on the policy; and notice thereof was given to L. by a circular, but he took no notice of it. On L.'s claiming on his policy against the W. Company, which had granted it, the official liquidators contended that there had been a novation with the other companies, but it was*

Held that there had not been sufficient to create a novation.

On the 6th Dec. 1862 *an order for winding-up the W. Company had been made on the petition of creditors and shareholders; and in Jan.* 1863 *advertisements had been inserted in various newspapers, calling on creditors to come in and prove their debts in the winding-up. L. did not come in and prove on his policy, and he now alleged that he never knew anything about this winding-up.*

Held, that knowledge of the winding-up must be imputed to L., and that although there was no novation, yet inasmuch as he had not gone in and proved in the winding-up, he must be taken to have abandoned his right of proving against the W. Company, for the purpose of adopting the B. Association and the E. Society as his debtors.

THIS was a question of liability on a policy of life assurance.

In June 1854, Mr. Lines effected a policy of life assurance with the Waterloo Life, Education, Casualty, and Self Relief Assurance Company, which was constituted under the Statutes of the 7 & 8 Vict. c. 110, and 10 & 11 Vict. c. 78, by a deed of settlement, dated the 10th Nov. 1851. By the policy it was witnessed that the funds and other property of the company should be subject and liable, according to the provisions of the deed of settlement, to pay to the executors, administra-

tors, or assigns of Mr. Lines the sum of 100*l.* upon proof of his death, with participation in the advantages of the company, subject to the payment of the premiums "at the office of the said company," with a proviso that "the capital stock of four hundred thousand pounds sterling and other the stocks, funds, securities, and property of the said company remaining at the time of any claim or demand, made unapplied and undisposed of, and inapplicable to prior claims and demands, in pursuance of the trusts, powers, and authorities, contained in the said deed or deeds of settlement shall also be liable to answer and make good all claims and demands upon the said company." In 1858 he effected a similar policy with the same company.

He continued to pay the premiums on his policies to the Waterloo Company down to the 21st June 1862, the following being the form of the receipts:

Waterloo Life, Education, Casualty and Self Relief Assurance Company.
355, Strand, London, W.C.
21st June 1856.

Received of Mr. George Lines, of 19A, Bridge Houseplace the sum of 1*l.* 5*s.* 8*d.*, being the amount of one half-year's premium payable in respect of an assurance effected for 100*l.* on the life of himself for the whole term. T. G. WILLIAMS,
Manager and Secretary.

In 1862 negotiations were entered into for the transfer of the busines of the Waterloo company to the British Nation Life Assurance Association, which was established under the same statutes 7 & 8 Vict. c. 110, and 10 & 11 Vict. c. 78, by a deed of settlement dated the 28th Feb. 1855 which contained provisions enabling the Association to purchase the business of another company (see clause 45, *sup.*, p. 40).

There were powers in the deed of settlement of the Waterloo Company for dissolving the company, and for handing over its business to another company (the deed containing clauses similar to clauses 172, 173, of the Royal Naval Society's deed, with the exception that it did not contain the proviso of clause 173 with regard to carrying on business: see clauses 172 and 173, *sup.*, p. 47.)

In 1862, the Waterloo Company was duly dissolved, and on the 31st July 1862 an agreement was entered into for the transfer of its business to the British Nation Association. By this agreement it was arranged that the Waterloo Company should transfer its business to the British Nation Association, together with the right to receive all premiums on the Waterloo policies; and that in consideration thereof the British Nation Association should pay a certain sum to the Waterloo Company, and should "guarantee and undertake unto the Waterloo Company," to make to the Waterloo policyholders, as the times for payment should arrive, full payment of all sums secured by the policies; that one share in the British Nation Association should be given to each shareholder of the Waterloo Company, in respect of every twenty shares held by him; and that, upon the application of any Waterloo policyholder, the British Nation Association would issue to him a new British Nation policy in lieu of his Waterloo policy, or would place upon it an indorsement of guarantee by the British Nation Association of the sum assured.

No other provision was made for the liabilities of the Waterloo Company, and no declaration of the dissolution of the company was ever made by advertisement or otherwise.

In August 1862, the following circulars were sent to the policyholders in the Waterloo Company:—

Waterloo Life Assurance Company.
13th Aug., 1862.

Dear Sir,—The proprietors of this company, on the recommendation of the directors and after very mature deliberation, have decided to accept an offer made by another association to unite the business of the two companies. In adopting this course, the directors feel that they are consulting the interests of all parties in this institution, and that they will obtain larger prospective advantages for the policyholders than could have been secured under the best auspices by remaining in a separate condition.

This union, which takes effect from midnight of the 31st July last, has been made with the British Nation Life Assurance Association, of 316, Regent-street, and it is intended to carry on the joint businesses at their offices.

The terms and conditions contained in the policies issued by this company will remain in all cases unaltered by this arrangement.

The policyholders are fully guaranteed for all claims under their present policies by the British Nation by the deed between the two companies, but any of the assured desiring it can have the endorsement to that effect made on their policies.

All communications should henceforth be addressed to, and all premiums due on and after the 1st Aug. inst. paid to the receipt of, Henry Lake, Esq., Manager of the British Nation Life Assurance Association, 316, Regent-Street, London.

Should you, however, have been accustomed to pay your renewal premium through an agent, you will still do so, as arrangements are made which will enable the existing agents of the Waterloo to act for the British Nation.

The Report of the British Nation for the year ending 31st March 1862, shows the following:

Annual premium income	136,965*l.*
Invested funds and property	257,861*l.*
Annual revenue thereon	9,865*l.*
The annual income therefore of the British Nation, as shown by its last annual Report, was	147,000*l.*

This most satisfactory position is now still further improved by its subsequent business, and by the union of this company, and the income of the British Nation is now raised to 170,000*l.* per annum.

The great advantages of the amalgamation of companies are now being thoroughly recognised and appreciated by the public.

They may be summed up briefly thus: the union of companies increases business, income, security, and bonus; and decreases expenditure, competition, and the liability to fluctuation. The business of two companies can be conducted in one office and by one staff without material additions, and the whole of the saving goes to improve the prospects of a large bonus.

I feel assured, therefore, that you will perceive at once the advantages which this union will secure to the policyholders of this company.

The Waterloo policyholders will not only have the security of the large annual income of the joint business, but it has been arranged that in all future bonuses they shall participate on an equality with the other policyholders in the conjoint companies. They will thus secure not only all the benefits to which they are entitled in this company, but the additional advantages to be derived from the accumulation of income and power.

The directors feel that in the step they have taken they have considered the best interests of the assured, and have obtained for them increased security and large permanent advantages. JOSEPH BISHOP, Chairman.

British Nation Life Assurance Association,
13th Aug. 1862.

DEAR SIR,—It is announced to you by the accompanying letter of the Chairman of the Waterloo Life Assurance Company that an arrangement has been concluded for the union of the business of that company with this association.

Under the deed made between the British Nation and the Waterloo Company it is not necessary for us to trouble policyholders to send their policies for endorsement by this association. Should you, however, wish it, if you will forward your policy either direct or through the agent in your district, it shall be immediately (after the succeeding Thursday) returned to you endorsed, signed by three directors and sealed with the seal of this association. But it is necessary for me to inform you that all policyholders are perfectly secure under the renewal receipts, and that the terms and conditions contained in the policies issued by the Waterloo Company remain unaltered by the transfer.

The subscribed capital of this association is nearly 300,000*l.*; the annual income is 170,000*l.*; and the invested funds (irrespective of capital) are upwards of 257,000*l.*

The new premium income from new business effected during the past year amounted to 16,364*l.* per annum.

The public appreciation of the principles of this association may be seen by the great progressive increase of new business in each of the following years:—

	Proposals.	Policies.	New Income.
1860	1559	1096	£ 6,828
1861	2144	1665	11,800
1862	3003	2356	16,364

Whether regarded for the annual income or for the great amount of new business, so far surpassing the majority of successful offices, the position of this institution is most gratifying. The distinctive principles, which render it thus popular, are set forth in the prospectus, and I would invite your especial attention to the following:

1. The application of the profits to rendering the policy payable during the lifetime of the assured.

2. The avoidance of all uncertainty or litigation by making policies indisputable.

3. The assistance granted to an assurer in the payment of his premium, thus averting the chance of losing the benefit of the policy by forfeiture through inability to pay the premium. These truly popular features constitute a valid reason why an assurer should choose to take a policy of this association. Your position as a policyholder, I need scarcely remark, will be greatly improved by the arrangements now made. By the union of interests, and by the conduct of the joint business in one office and by one official staff, a very considerable reduction of expenditure will be effected, which must add considerably to the bonus; while the rate of new business, large as it is at the present time, will be still more accelerated by the concentration of interests and income. It may also be gratifying for you to know that the British Nation and the companies united with it have paid more than 3000 claims to policyholders, amounting, with bonus additions, to upwards of a million and a quarter sterling.

Allow me, therefore, to express the hope that you will as a policyholder do all in your power to uphold and increase the business by reverting to the subject of assurance among your friends, and, if it be not inconvenient to you, by rendering aid through introductions and otherwise to the agents in your district. You will thereby be not only promoting the general prosperity of the institution, but by thus adding to the profit fund you will be increasing the value of your own policy.

HENRY LAKE, Manager.

Mr. Lines received these circulars, but he did not have a new policy or have his policy endorsed; however he subsequently paid his premiums to the British Nation Association until 1865, when the British Nation Association transferred its business to the European Assurance Society (*vide sup.* p. 41), which was registered under the 7 & 8 Vict. c. 110, and was governed by a deed of settlement dated the 2nd Sept. 1854.

Mr. Lines now alleged that he had no notice of this amalgamation and did not receive any notices of renewal of his policies from the European Society. But from 1865 to 1871 he paid his premiums to the European Society. The receipts given by the British Nation Association and the European Society respectively were as follows:

British Nation Life Assurance Association, with which is united the business of the Waterloo Life Assurance Company.

Policy Nos. 865 and 2295.

Received this 27th day of Dec. 1862 the sum of £2 11s. 4d. being the payment of half yearly premium from the 21st of Dec. 1862 to the 21st day of June 1863 for an assurance on the life of G. Lines, effected by the before named policy. HENRY LAKE, Manager.

British Nation Life Assurance Association, in union with the European Assurance Society.

Policy No. 2295.

Received this 23rd day of June 1865, the sum of one pound five shillings and eightpence, being the payment of half-yearly premium from the 21st day of June 1865, to the 21st day of Dec. 1865, for an assurance on the life of George Lines, effected by the before-named policy.

HENRY LAKE, Manager.

European Assurance Society.

Policy No. 2295.

Received this 4th day of Jan. 1867, the sum of one pound five shillings and eightpence, being the payment of six months' premium from the 21st Dec. 1866, for an assurance on the life of G. Lines, effected by the before-named policy.

J. WORTOR, }
———, } Directors.

Printed receipts for renewal premiums issued from the chief office will alone be admitted as valid.

In April 1867, a reversionary bonus of 1*l.* 12*s.* was declared by the European Society upon each of his policies, and notice thereof was given to him in the following circular:

Bonus Notice.

European Assurance Society,

April, 1867.

Policy No. 2295. Life of G. Lines.

I am instructed by the board of directors to announce to you that a valuation of the affairs of this society up to the 31st Dec. 1865 has been completed, and that an allotment of reversionary bonus to that period has been made.

I have great pleasure in informing you that the reversionary sum added to the above policy at this division is 1*l.* 12*s.* You will please attach this notice to the policy as the official declaration of the bonus addition. The business is still rapidly increasing, and it is hoped that at each succeeding valuation the bonus will be materially augmented. HENRY LAKE, Manager.

To Mr. G. Lines, or the person legally entitled to the policy.

Mr. Lines, however, took no notice of this circular.

All three of the companies were ordered to be wound-up. On the 24th Nov. 1862, shortly after the transfer of the Waterloo Company's business, a petition was presented by creditors and contributories of that company to wind it up, and a winding-up order was made on the 6th Dec. 1862. In Jan. 1863 the following advertisement for creditors was inserted in the *London Gazette*, the *Times*, the *Morning Herald*, the *Sheffield Times*, the *Liverpool Mercury*, and the *Sheffield and Rotterdam Independent*:

In the matter of the Companies Act 1862, and of the Waterloo Life, Education, Casualty, and Self-relief Assurance Company.

The creditors of the above-named company are required on or before the 9th Feb. 1863, to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any), to William Canwell, of No. 11, Old Jewry, in the City of London, accountant, the official liquidator of the said company. And if so required by notice in writing from the said official liquidator, are by their solicitors to come in and prove their said debts or claims at the chambers of the Master of the Rolls, in the Rolls-yard, Chancery-lane, in the county of Middlesex, at such time as shall be specified in such notice, or in default thereof they will be excluded from the benefit of any distribution

made before such debts are proved. Monday, 9th March, 1863, at twelve o'clock at noon, at the said chambers, is appointed for hearing and adjudicating upon the debts and claims.

In pursuance of this advertisement, divers creditors brought in their claims, which were thereupon adjudicated upon by the chief clerk. And in June 1868, dividends, amounting to 20*s.* in the pound, had been paid thereon.

Mr. Lines, who was at this time carrying on business at Southwark Bridge-road, as a coachmaker, did not carry in any claims in respect of his policies. He now alleged that he never knew, saw, or heard of the advertisement or any of the other proceedings with regard to the winding-up.

The order to wind-up the European Society was made on the 12th Jan. 1872, and the voluntary winding-up of the British Nation Association under a resolution of the 18th Jan. 1872, was continued by an order of the Court of Chancery dated the 29th Jan. 1872.

No proceedings were taken in the liquidation of the Waterloo Company from 1868 until after the presentation of the petition to wind-up the European Society, when Mrs. Puddicombe, on the 15th April 1872, applied for leave to go in and prove such claim as she could establish against the Waterloo Company, notwithstanding that the time had expired for adjudicating upon claims. The application was not opposed, and leave was given to her to go in and prove.

Mr. Lines now claimed on his policies against the Waterloo Company, but the official liquidators contended that he had no claim against that company.

Napier Higgins, Q.C. and *Montague Cookson* for the official liquidators.—There was a novation of contract, first with the British Nation Association and subsequently with the European Society. All the conditions required by Lord Westbury have been satisfied (*vide sup.* p. 30). The transferor company had the power to transfer, and the transferee company had the power to take over the business. There was an offer to the policyholder of a new contract, and the acts of the policyholder showed an acceptance of the offer. The bonus declared by the European Society is conclusive as to the novation. Though the circular was not answered, it was just as if he had actually received the bonus: (*Glazebrook's case* Reilly's Alb. Rep. p. 135.) With regard to the premiums, it cannot be said that they were received by the European Society as agents of the Waterloo Company; for the Waterloo Company's dealings were only with the British Nation Association, and, moreover, after the commencement of the winding-up nobody could be appointed as agent to the company for any purpose. Even if there were no novation, the greatest publicity was given to the proceedings in the winding-up of the Waterloo Company; and knowledge thereof must be imputed to Mr. Lines: (*Carpmael's case, sup.* p. 95.) As he did not carry in any proof, he must be taken to have given up his rights against the Waterloo Company. In any case he cannot prove for the present value of the policy, including the premiums paid since 1868, for after the commencement of a winding-up, no further obligation can be incurred by a company. The following cases were also cited:

Rivaz's Case, Reilly's Alb. Rep. 104; 16 S. J. 590;
Kennedy's Case, Reilly's Alb. Rep. 5; 15 S. J. 729;
Re The National Provincial Life Assurance Society, L. Rep. 9 Eq. 306; 22 L. T. Rep. N. S. 465;
Re The Manchester and London Life Assurance Association, L. Rep. 5 Ch. 640; 23 L. T. Rep. N.S. 332;
Re Times Life Assurance Company, 22 L. T. Rep. N. S. 198; L. Rep. 5 Ch. 381;
Lancaster's Case, Reilly's Alb. Rep. 95; 15 S. J. 748;
Re Anchor Insurance Company, L. Rep. 5 Ch. 632;
Re Medical Invalid Insurance Society, Spencer's Case, L. Rep. 6 Ch. 362; 24 L. T. Rep. N. S. 455;
Allen's Case, Reilly's Alb. Rep. 127; 16 S. J. 657;
Carr's Case, Re The Waterloo Life Assurance Company, 33 Beav. 542;
Puddicombe's Case, sup. p. 66;
Coghlan's Case, sup. p. 31;
Blundell's Case, sup. p. 39.

De Gex, Q.C. and *Horton Smith* for the policyholder.—In the amalgamation circulars the Waterloo policyholders were distinctly told that the terms and conditions of the policies were to remain unaltered by the arrangement. There was no extinction of the old obligation; the obligation of the British Nation Association was cumulative and not substitutional. There was an offer of a cumulative security, and that offer was accepted. Thus there was no novation. Moreover this very case has been already decided by Lord Westbury in *Conquest's case* (*vide sup.* p. 67). See also

Winter v. *Innes*, 4 My. & Cr. 101;
Harris v. *Farwell*, 15 Beav. 31;
Ex parte Jackson, 2 M. D. & De G. 146;
Swift's case, sup. p. 89;
Kelly's case, sup. p. 89;
Barnes's case, sup. p. 72;
Burns's case, sup. p. 127.

With regard to the winding-up of the Waterloo Company and the advertisement for creditors, the policyholder knew nothing about it. In *Carpmael's case* (*sup.* p. 95), Mr. Carpmael had been a patent agent, in constant communication with the Chancery Bar. He was dead, and Lord Westbury proceeded on the assumption that he knew all about the winding-up. Moreover there was an endorsement on the policy in that case, and there is none here. We originally claimed the premiums paid since the order to wind-up the Waterloo Company. But we do not press this claim. Our claim is to prove against the Waterloo Company for what the policy was worth at the date of the winding-up of that company.

Napier Higgins in reply.

Judgment was reserved.

Monday, Feb. 2.

Lord ROMILLY.—

The Waterloo Life Assurance Company was constituted under the statutes of the 7 & 8 Vict., and the 10 & 11 Vict., by a deed of settlement dated the 10th Nov. 1851. The capital of the company was 400,000*l.*, divided into 80,000 shares of 5*l.* each. By a policy of assurance of the company, dated the 21st June 1854, it was witnessed that the funds of the company should be subject, according to the deed of settlement, to pay to the executors, administrators, or assigns of George Lines, the sum of 100*l.* on proof of his death, with participation in the advantages peculiar to the company, subject to the payment by him of the quarterly premium of 12*s.* 11*d.* By a memorandum dated the 17th Sept. 1854, endorsed on the policy, in lieu of the said premium a premium of 1*l.* 5*s.* 8*d.* was to be paid half yearly. On the 21st June 1858 Mr. Lines effected a further policy for a like sum of 100*l.* at the same half yearly premium of 1*l.* 5*s.* 8*d.* Mr. Lines continued to pay to the company the premiums on the policies down to the 21st June 1862. A

reversionary bonus of 2*l.* 10*s.* was declared on the first policy on the 29th Sept. 1859, and on the same day a like bonus of 10*s.* was added to the second policy. The British Nation Association was constituted under the same statute by a deed of settlement dated the 28th Feb. 1855. In 1862 negotiations were set on foot for the transfer of the business of the Waterloo Company to the British Nation Association, which were afterwards approved and carried into effect by a meeting on the 31st July 1862. On the same day an agreement, subject to confirmation by the shareholders of the company, was entered into by three of the board of directors of the Waterloo Company on the one part and three of the board of directors of the British Nation Association on the other part, for the transfer of the business of the Waterloo Company to the British Nation Association. Circulars informing policyholders and annuitants in the Waterloo Company were duly issued, accompanied by a regular notice from the British Nation Association. Mr. Lines received these circulars, and paid the premiums due on his policies to the British Nation Association, and received from them a receipt for the payment. In Dec. 1862 an order was made to wind-up the Waterloo Company, and on the 9th Jan. 1863 an advertisement for creditors was settled and signed by the chief clerk, and shortly afterwards the same was advertised. By an indenture of the 16th March 1865, it was mutually covenanted between the British Nation Association and the European Society that after the execution of the indenture the association and the society should be united and consolidated as one company under the name of the European Assurance Society, and that such united society should be regulated according to the Society's deed of the 2nd Sept. 1854, and the society covenanted with the association that it would, after the execution of that indenture, pay and perform all debts and other engagements, and would at all times keep indemnified the association and the individual shareholders thereof against all claims and demands whatsoever on account of the same or any or either of them. In the month of April 1867 a reversionary bonus of 1*l.* 12*s.* was declared by the European Society upon each of these policies, and notice of it was given by a circular, which was received by Mr. Lines. The European Society was ordered to be wound-up on the 12th Jan. 1872, and the British Nation is in course of voluntary liquidation under a resolution passed on the 18th Jan. 1872, which was continued under an order of the Court of Chancery, dated the 29th Jan. 1872, subject to the supervision of the court. The policies on the life of Mr. Lines were never endorsed either by the society or by the association. No proceedings had been taken in the liquidation of the Waterloo Company from 1868 until after the presentation of the petition to wind-up the European Society, when one Juliana Puddicombe, on the 15th April 1872, applied for leave to go in and prove such claim as she could establish as a creditor in the Waterloo Company, notwithstanding that the time had expired for adjudicating upon claims. No opposition was offered to her application, and leave was accordingly given to her to prove, on payment of the costs of the application. No opposition being offered, the claim was carried in and allowed.

In this state of circumstances it is contended that Mr. Lines must be taken to have novated with the British Nation Association and the European Society, or that at all events he must be taken to have had notice in the year 1862 of the order for winding-up the Waterloo Company, and to be concluded thereby. I am of opinion that, though the subsequent dealings of Mr. Lines with the British Nation Association and the European Society, do not constitute a novation by themselves, yet he must, upon the facts detailed, be taken to have had notice, in the year 1862, of the order for winding-up the Waterloo Company, which has not since carried on business; and having received such notice, and having omitted to prove in respect of the value of his policies in the winding-up of that company in pursuance of the advertisements duly issued, he must be taken to have abandoned his right to prove against the Waterloo Company, for the purpose of adopting the British Nation Association and the European Society as his debtors, to whom he paid premiums after the date of the order to wind-up the Waterloo Company, and that, consequently, he ought not to be allowed now to prove in respect of his policies, or either of them, as against the Waterloo Company. With regard to the costs, Mr. Lines will be paid his costs by the official liquidators, the case having been agreed on as a representative case.

Solicitor for Mr. Lines, *Charles Wellborne.*

Solicitors for the official liquidators, *Mercer* and *Mercer.*

Jan. 8 *and Feb.* 2.

Stevens's Case; Nuttall's Case.

Company—Amalgamation of companies—Novation—Consideration for the novation of a policy of assurance.

An agreement was made that the E. Life Assurance Company should take over the business of the P. Life Assurance Company which was being wound-up, and should assume all their benefits and liabilities; and that the difference between the premiums payable upon any P. company's policy and the premiums which would have been payable had the policy been then granted by the E. Company, should be valued as a capital sum with interest at 4 per cent. per annum, and that the amount of such valuation was to be payable to the E. Company by the assured, or at his option might remain a charge on the policy with interest at 4 per cent. per annum; and that every such payment or charge was to be deemed a debt from the P. Company to the assured.

S. surrendered his P. Company's policy, and received an E. Company's policy in exchange. On the new policy was an endorsement that it was a condition of the assurance that 44*l.* 17*s.* 1*d. with interest thereon at* 4 *per cent. should be deemed a debt due on the policy, and that the Society should be entitled to deduct it when the sum assured became a claim, with a proviso that all sums that might be received from the P. Company should be deemed a part payment of the debt.*

N. did not surrender his policy, but had his old one indorsed with a similar indorsement. He paid but one premium afterwards, and the policy dropped in consequence. He received dividends from time to time declared by the P. Company on the debts indorsed on this policy. S. continued his policy, and allowed the E. Company to receive

the dividends declared on it by the P. Company. In the winding-up it was

Held, that the E. Company were entitled to recover from S. the sum charged on his policy, together with interest at 4 per cent, as a debt due from him to the Company, giving credit for the dividends received by S. from the P. Company. And that with regard to N., the E. Company were entitled to recover from him the amount of the dividends received by him from the P. Company.

THE facts of this case are sufficiently set forth in the judgment.

Napier Higgins, Q. C. and *Montague Cookson*, for the official liquidators of the European Society, contended with regard to Stevens, that after giving credit for the sums received by them from the Professional Company, the society were entitled to recover from him the sum charged on his policy, with interest at 4 per cent., as a debt due from him to the society, this being in fact the consideration payable by him to the society for taking over the risk on his policy. But for this consideration, a larger premium would have had to be paid to the society. And with regard to Nuttall, that the society were entitled to recover from him the dividends received by him from the Professional Company; and also the balance of the amount charged on his policy, although the policy had been allowed to lapse.

John Pearson, Q.C. and *Waller*, for Stevens and Nuttall, contended that no such debts could be recovered by the society; and, further, that as regards the former, the amount charged on his policy, if declared a debt, ought to be deducted from the amount of his claim against the society, and not from his dividend. In *Nuttall's* case, a contention was at first raised, but was afterwards withdrawn, that the society's claim was barred by the Statute of Limitations.

Roxburgh, Q.C., appeared for the Professional Company, but took no part in the argument, inasmuch as the contention on the part of Stevens and Nuttall, was withdrawn, that "in the event of their being able to establish the existence of assets of the Professional Company by the application of the principle of marshalling, they are entitled to prove against the company for the balances of the debts indorsed upon their respective policies."

The following cases were referred to:

Re Professional Life Assurance Company, L. Rep. 3 Eq. 668;
Gloag's case, *sup.*, p. 82;
Price v. *Parlby*, 15 S. J. 654;
Eagle Insurance Company's case, 16 S. J. 483;
Delhi Bank's case, 15 S. J. 923.

Lord ROMILLY.—

Stevens's case and *Nuttall's* case, although not the same, are cases that arise from dealings with the Professional Insurance Company on arrangements being made for the European Assurance Society to take over its policies. Mr. Stevens was the holder of a life policy in the Professional Company, and Mr. Nuttall was the holder of an endowment policy. Mr. Stevens's policy was granted in 1850, and Mr. Nuttall's in 1855. The European Society was established on the 2nd Sept. 1854. In June 1861 negotiations were set on foot between Mr. Harding, the official manager of the Professional Company (which was being wound-up) on the one hand, and the European Society on the other hand, whereby the European Society was to take a transfer and assume all the benefits and liabilities of the life assurance and other business of the Professional Company, which was being wound-up. A memorandum of agreement was made between Mr. Harding of the one part, and the European Society of the other part, by which, among other things, it was agreed to this effect, that "with respect to policies issued in exchange for those granted by the Professional Company previously to the 1st Jan. 1857, the difference between the premiums, which will be payable upon any such policy pursuant to the 3rd clause hereof, and the premiums which would have been payable, had the policy been granted by the European Society, according to their table applicable to such policy, and having regard to the present age of the assured, and other material circumstances (if any), is to be valued as a capital sum upon a computation of interest at the rate of 4*l.* per centum per annum, and the amount of such valuation less 15 per cent. (except as to endowments, whereby payment is assured at a specified age, or sooner in the event of death), and the full amount of such valuation, as to such excepted endowments, is to be payable to the European Society by the assured or other person or persons to whom such policy shall be granted at the time of the same being granted; or at the option of the assured, or other person or persons aforesaid, may remain a charge upon the policy with interest at the rate of 4*l.* per centum per annum from that time, and the amount of every such payment or charge is to be deemed a debt from the company to the assured, or other person or persons making the payment, or whose policy shall be so charged; but with respect to policies issued in exchange for those granted by the Professional Company subsequent to the 31st Dec. 1856, no such valuation of the difference of premium shall be made and such exchange of policies shall be made without any payment by the assured or charge upon the policy, the value of the difference of premiums which would be payable but for this stipulation, and the before-mentioned deduction of 15 per cent being regarded as an allowance or equivalent for the goodwill of the business." The agreement was on the 13th June 1861, approved and confirmed by the court, and a circular was sent to holders of polices granted prior to 1st Jan. 1857, informing them of the arrangement, and another circular was sent to holders of policies granted subsequent to 1st Jan. 1857. Acting on the suggestion contained in the circular some of the policyholders surrendered the policies which had been effected by them in the Professional Company and received policies in the European Society in exchange. But the majority, including Nuttall, had their old policies indorsed with the following memorandum: "It is hereby declared that subject to the proviso hereunder stated, the funds and property of the European Assurance Society of London as provided for in the deed of settlement of the said society shall be liable for the due payment of the sum of 500*l.* (without profits) assured by the within policy with the Professional Life Assurance Company of London to the person or persons legally entitled to receive the same when the within named William Henry Nuttall shall have attained the age of twenty-one years. Provided always that the future premiums payable in respect of the said policy be duly paid to the said European Assurance Society at the times and in

the manner set forth in the said policy. Provided always and it is hereby declared, that it is a condition of this assurance that the sum of 113*l.* 14*s.* 8*d.* with interest thereon at the rate of 4*l.* per cent. per annum from the 1st day of June 1861, shall be deemed a debt upon this policy, and that the said Society shall be entitled to deduct the same from the amount assured when this policy shall become a claim. Provided always that all sums which shall be paid by the assured to the said society on account of the said debt, and also all sums which the said society may receive from the estate of the Professional Life Assurance Company upon the same account shall be allowed in part payment of the said debt. 24th Oct. 1861." On the 19th June 1861, Stevens, instead of having his policy indorsed with a memorandum, exchanged the policy, which was formerly held by him in the Professional Company, for a policy issued by the European Society, and upon such policy the following memorandum was indorsed: "It is hereby declared that it is a condition of this assurance that the sum of 44*l.* 17*s.* 1*d.* with interest thereon at the rate of 4*l.* per cent. per annum, from the 1st June 1861 shall be deemed a debt due upon this policy, and that the within (European) society, shall be entitled to deduct the same from the amount assured when this policy shall become a claim. Provided always that all sums which shall be paid by the assured to the said society on account of the said debt, and also all sums which the said society may receive from the estate of the Professional Life Assurance Company upon the same account, shall be allowed in part payment of the said debt." Nuttall only paid one premium after his policy had been indorsed, and for default the policy lapsed; but he, with others, received the dividends declared from time to time by the Professional Company, amounting, in the aggregrate, to 12*s.* in the pound upon the debts indorsed on the policies; but the majority, including Stevens, permitted the European Society to receive the first and second dividends, and themselves received the third. In this state of the case questions have arisen between the official liquidator and the former policyholders in the Professional Company as to the right of proof in respect of policies, either exchanged by them or bearing the indorsement already referred to.

Upon the whole of this case, I am of opinion that the European Society is entitled to recover the balance of the sums charged upon Mr. Stevens's policy, with interest at 4 per cent, as a debt due from him to the society, after giving credit thereon for the dividends received by the society from the Professional Company, and that it may be set-off against any dividend payable to him by the European Society on his proof for the value of his policy. And with respect to Mr. Nuttall, I am of opinion that the European Society is entitled to recover from him the amount of the dividend received by him from the Professional Company.

Solicitors for Mr. Stevens and Mr. Nuttall, *Stevens, Wilkinson,* and *Harries.*

Solicitors for the Professional Company, *Travers Smith,* and *Co.*

Solicitors for the European Society, *Mercer* and *Mercer.*

Thursday, May 14.

GRAIN'S CASE.

Life assurance company—Winding-up—Amalgamation of companies—Novation of contract.

An indorsement on a policy by transferee company, enabling the policyholder to reside abroad for an additional premium, is not a novation.

Where, after an amalgamation of two life assurance companies a policyholder in the transferor company had his policy indorsed by the transferee company with a memorandum that, in consideration of the additional premium of 16*l.*, *the assured was allowed to proceed to, to reside in, and to return from, Jamaica without prejudice to the assurance, in the winding-up of the two companies, it was contended by the official liquidator that there had been a novation with the transferee company, but it was*

Held, that there had been no novation, and that the policyholder was entitled to claim against the transferor company.

THIS was a question of novation.

In Nov. 1861 the Royal Naval Society granted to Colonel Grain a policy on his own life, for the sum of 400*l.* with profits. The form of the policy was similar to that on p. 89 (*sup.*)

In Sept. 1866 the Royal Naval Society transferred its business to the European Assurance Society by two deeds of amalgamation (*vide sup.* p. 48).

The Royal Naval Society thereupon ceased to carry on business, and the entire business of the two societies was afterwards carried on by the European Society.

The three circulars, that were sent to the policyholders on this amalgamation (*vide sup.* pp. 89, 90), were received by Colonel Grain.

No bonus was ever declared by the European Society in respect of his policy.

On the policy were endorsed certain conditions; among others the following:

Persons, whose lives are assured, may also reside in any part of the Canadas, Nova Scotia, the Eastern Side of the Northern Seaboard States of the Western Hemisphere to the northward of latitude 40°, St. Helena, Ascension, Madeira, the Canary Islands, South Africa without the Tropic, Australia south of the Tropic, Van Dieman's Land, New Zealand, or the Falkland Islands without obtaining any special permission from the directors for that purpose, and without paying any additional premium beyond such additional premium for the risk of the voyage to or from any of those places as according to the society's existing rates for the time being shall be payable, or as a board of directors shall specially determine in each particular case for such risk. But policies on the lives of persons assured will become void on their going into any part of the world not above authorised, or going to any of the above-mentioned places out of Europe to reside there, or departing therefrom, or engaging in war, unless the insurance extend to such risk, or not extending thereto unless the assured take the earliest means of communicating every such going or departure, or engaging in war, to the directors under such regulations as they may from time to time prescribe, and pay the additional premiums on account of the voyage or other increased risk according to the society's existing rates for the time being, or as a board of directors shall specially determine for each particular case, such additional premiums being in no case less than for one whole year, unless the directors think proper to determine otherwise.

In Sept. 1867, Colonel Grain wished to go to Jamaica, and to reside there; accordingly in order to enable him to do so, the following memorandum

was indorsed on the policy by the European Society:

Memorandum. In consideration of the additional annual premium of £16, payable on the 2nd Sept. in every year, the within assured is allowed to proceed to, to reside in, and to return from Jamaica, without prejudice to this assurance. Henry Lake,
2nd Sept. 1867. Manager.

In the winding-up of the two companies, some years afterwards, Colonel Grain claimed to be entitled to prove on his policy against the Royal Naval Society. The official liquidator contended that by having had this indorsement made he had entered into a new contract with the European Society, which precluded him from claiming against the Royal Naval Society.

Napier Higgins, Q.C. and *Montague Cookson*, for the official liquidator.—Here there was a novation in accordance with Lord Westbury's definition of novation (*vide sup.* p. 30). The parties met together for the purpose of entering into a new contract, and of releasing the transferor company. It certainly was a new contract with the European Society, for the Royal Naval Society might have imposed other conditions, and have charged a higher premium in respect of his going to Canada. The Royal Naval Society were not parties to this new contract, and it is to the European Society only that Colonel Grain must look for payment.

Knox's case, Albert Arbitration, Reilly's Rep., p. 132; 16 S. J. 673;
Glazebrook's case, Albert Arbitration, Reilly's Rep., p. 135;
Allen's case, Albert Arbitration, Reilly's Rep., p. 127; 16 S. J. 657.

F. C. J. Millar for the policyholder was not called on.

Lord Romilly.—

I think there is no novation in this case. It is governed in substance by Lord Westbury's decisions.

Solicitors for Colonel Grain, *Wood, Street*, and *Hayter*.

Solicitors for the official liquidators, *Mercer* and *Mercer*.

Thursday, May 14.

Wilson's Case.

Life Assurance Company—Amalgamation of companies—Winding-up—Novation of contract—Policy.

Claim on transferee company and admission of the claim before liquidation do not constitute a novation.

After the amalgamation of two life assurance companies, a policyholder in the transferor company died, and his executrix made a claim against the transferee company, and the claim was admitted. Subsequently the company was ordered to be wound-up, and in consequence the claim was not paid. The executrix then claimed against the transferor company, but the official liquidator of that company contended that there had been a novation with the transferee company.

Held, that the claim on the transferee company, and the admission of the claim, did not constitute an abandonment of the liability of the transferor company.

This was a question of novation.

In 1848 the Royal Naval Society granted a policy of assurance to Andrew Wilson on his own life for the sum of £100 without profits.

In 1866 the Royal Naval Society transferred its business to the European Assurance Society by two deeds of amalgamation (*vide sup.*, p. 48). The Royal Naval Society thereupon ceased to carry on business, and the entire business of the two societies was afterwards carried on by the European Society.

The three circulars that were sent to the policyholders on this amalgamation (*vide sup.*, pp. 89, 90), were received by Mr. Wilson.

Mr. Wilson never sent in his policy for indorsement by the European Society, nor was any new policy issued to him by that society guaranteeing the original policy or in lieu thereof. However, he paid his premiums thenceforward to the European Society.

He died on the 22nd April 1871, and Mrs. Wilson, his widow and executrix, duly proved his will. Shortly afterwards she made a claim on the policy against the European Society, writing to the directors of that society as follows:—

Gentlemen,—I have to announce the death of Mr. Andrew Wilson, whose life was assured in the European Assurance Society for 100*l.*; No. of policy 1598. He died on Saturday the 22nd April 1871, at 1, Rathgar-place, Plumstead Common-road, Plumstead, Kent.
Elizabeth Wilson.

Thereupon the forms in proof of death, required by the European Society to be filled up, were sent to her, and were duly filled up by her and returned to the society. On the 16th May 1871 the claim was admitted by the directors of the European Society, and Mrs. Wilson received a notice of the admission.

On the 10th June 1871 the petition to wind-up the European Society was presented; and shortly afterwards a correspondence took place between Mrs. Wilson and the secretary of the European Society, in which she urged the society to pay her the sum assured. It was, however, never paid, owing to the petition and the proceedings thereon and the winding-up order, which was made on the 12th Jan. 1872. The Royal Naval Society was also ordered to be wound-up on the 1st March 1872. And it was on the 29th April 1872 that Mrs. Wilson first made any claim in respect of her policy against the Royal Naval Society.

The question for determination was whether she was entitled to prove on the policy against the Royal Naval Society, or whether there had been a novation with the European Society.

Napier Higgins, Q. C. and *Montague Cookson* for the official liquidator.—The claim on the policy was made, and was admitted before the commencement of the winding-up. Mrs. Wilson must, therefore, be taken to have adopted the European Society as her debtor, and to have released the Royal Naval Society. It may be that she had a right to elect against which of the two societies she should make her claim, but, having elected, she cannot now turn round and claim against the other, for the European Society would not be permitted to turn round and say, "We are not liable, it is the Royal Naval Society that is liable." This very question has been decided by Lord Cairns in *Budden's case* (Albert Arbitration, Reilly's Reports, p. 120; 16 S. J. 462).

F. C. J. Millar for the policyholder, was not called on.

Lord ROMILLY.—

I do not see any abandonment of the liability of the Royal Naval Society. Some act ought to be proved showing that.

Solicitor for Mrs. Wilson, *George Whale.*

Solicitors for the official liquidator, *Mercer* and *Mercer.*

Tuesday, May 12.

DOMAN'S CASE (No. 2).

Life assurance company—Winding-up—Contributory—Amalgamation of companies—Enrolment of transfer—A policy held to include the company's deed of settlement—Attempt to make a former shareholder in the transferor company a contributory.

Where a policy of assurance witnesses that "the funds and property of the company shall be subject and liable (according to the provisions of the company's deed of settlement) to pay and satisfy" the sum assured,

Held, that the policy includes all the words of the deed.

Where on an amalgamation of two life assurance companies, it was arranged that the shareholders of the transferor company should transfer their shares to the manager of the transferee company, and should receive in respect of their shares either cash or shares in the transferee company, and D., a shareholder, so transferred and received cash, but a memorial of the transfer was not enrolled in Chancery, in accordance with the transferor company's Act of Parliament, which provided that those whose names should appear in the last enrolled memorial, should be liable to all legal proceedings under the Act as existing shareholders of the company, and the policies were of the above form, on the winding-up of both the companies, the transferee company being unable to indemnify in full the creditors of the transferor company,

Held, that D. was not liable to contribute to the payment of creditors of the transferor company in respect of policies, although he might be liable to creditors in respect of the general debts.

THE facts of the case are stated in *Doman's case* (*sup. p.* 133). It was attempted to make Mr. Doman a contributory to the European Life Insurance and Annuity Company, he having, on the amalgamation of his company with the Peoples' Provident Society in 1858, transferred his shares to Mr. Cleland the manager of that society, and received 8*l.* in respect of each share from the society, but allowed his name to remain on the memorial of shareholders enrolled in the Court of Chancery.

On the hearing of the first case before Lord Westbury, his Lordship directed that "Mr. Doman ought to be considered as altogether freed and discharged from the status of shareholder in the European Company," but that declaration was made "without prejudice to any question as to the liability which Mr. Doman might be under, by virtue of his name remaining upon the memorial of shareholders of the European Company, to persons being creditors of the European Company and not having notice of or coming under the contract between the European Company and the People's Provident Society." The circumstances for a future application would, his Lordship said, probably be found to be the insufficiency of the assets of the People's Provident Society to answer all the claims that might be enforced by virtue of that registered memorial against Mr. Doman (*sup.* 136.)

The official liquidator had now investigated the liabilities of the European Company, and had found that they consisted of claims on policies and annuity contracts, amounting in the aggregate to 274,437*l.* 8*s.* 6*d.* The whole of the assets of the company consisted of 4219*l.* 19*s.*, which had been received from policyholders in respect of premiums between the 12th Jan. 1872, and the 23rd Jan. 1873, the respective dates of the orders to wind-up the society and the company. Nearly all the shares were now in the name of Mr. Cleland, the former manager of the People's Provident Society; and it was believed that no payment could be obtained from any of the persons in whose names the shares now stood. With regard to Mr. Cleland, it was never intended that he should contribute to the assets of the company, the shares having been transferred to him as part of the machinery for effecting the amalgamation of the company with the society. And the transferee society would be far from being able to pay in full the claims on the transferor company. The official liquidator accordingly now applied under the reservation of Lord Westbury, to have it declared that Mr. Doman was liable to contribute to the payment of the debts of the European Company in respect of policies, &c., granted during his membership.

In addition to sects. 18 and 23 (*sup.* p. 133) the European Company's Act of Parliament of 1844 contained the following sections:

Sect. 9:

That it should be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit, against any such nominal party as aforesaid, to be issued against all or any of the shareholders for the time being of the company, and if such execution should be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it should be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time the contract was entered into, upon which such action or suit should have been instituted. But no such execution against any person having ceased to be a shareholder should be issued without leave first granted by the court in which such judgment, decree, or order should have been obtained upon motion in open court, and, after notice of such motion, given to the person sought to be charged. Provided always that no person having ceased to be a shareholder of the company should be liable for the payment of any debt for which any such judgment, decree, or order should have been so obtained, for which he would not have been liable as a partner, in case a suit had been originally brought against him for the same; nor should the Act be deemed to enable any party to a suit to recover from any individual shareholder of the company, or any other person whomsoever, any other or greater sum than might have been recovered if the Act had not been passed.

Sect. 32:

That nothing in the Act contained should extend to incorporate the company, or to relieve or discharge the company, or any of the shareholders thereof, from any responsibility, duty, contract, or obligation whatsoever to which by law they then were, or at any time thereafter might be, subject or liable, either as between such company and other parties, or as between the company and any of the individual shareholders thereof and others, or as between themselves, or in any manner whatsoever.

Clause 125 of the European Company's deed of settlement:

That every seller of shares in the capital of the company shall transfer the same to the purchaser in such manner as the board of directors shall prescribe, either at the office of the company or at such other place as the board shall require, and every seller, immediately after he or she shall, in the manner prescribed by the board of directors, have transferred his or her shares, and shall have paid all instalments that may then have become due on the shares transferred, shall, in respect of such shares, cease to be a proprietor of the company, and shall for ever thenceforth be acquitted and discharged from all further obligations in respect of such shares, and from all the covenants, agreements, regulations, and stipulations to which, by the deed of settlement, he or she would have been liable in respect of the same shares, if he or she had not transferred the same.

The form of the policy granted by the European Company witnessed that in consideration of the payment of the premiums "the funds and property of the said company shall be subject and liable (according to the provisions of the said company's deed of settlement, bearing date the 10th July 1820) to pay and satisfy" . . . . the sum assured.

Napier Higgins, Q.C. and *Montague Cookson* for the official liquidator:—The circumstances, alluded to in Lord Westbury's judgment in *Doman's case*, No. 1, have now arisen; the People's Provident Society are not able to pay the creditors of the European Company in full. The company is a mere common law partnership, not registered under any joint stock companies Act, and therefore the partners are liable to all the contracts entered into while they were partners. Whatever be the provisions of the company's deed of settlement, they do not affect the rights of creditors, they are only an arrangement of the partners *inter se*. Creditors are not bound by the deed of settlement, for the policies do not incorporate the deed, the slight reference in them to the deed does not make it part of the contract: (*Barnes's case, sup.* p. 72) All that we ask is that it may be declared that Mr. Doman has not got rid of his common law liability on obligations entered into while he was a partner in the company. If this is not done, we shall have the strange result of a company being ordered to be wound-up on the petition of an annuity holder, of the liabilities on policies being nearly 300,000*l.*, and of there being no assets to meet the liabilities. In any case, Mr. Doman must repay to the company what he received in respect of the shares, for this was a return of capital:

Murrough's and Chamberlain's Case, 16 S. J. 483; *Lord Digby's Case, sup.* p. 150.

H. M. Jackson, Q.C. and *F. C. J. Millar* for Doman.—In *Doman's case*, No. 1, Lord Westbury held that Mr. Doman had made *de facto* and *de jure* a valid transfer of his shares, and that he was to be discharged from the status of shareholder in the European Company, reserving to the official liquidator a right to make an application under certain circumstances. Those circumstances have not arisen. If there were any debts on contract that did not come within the company's deed, then there might possibly be materials to enable the official liquidator to come here under Lord Westbury's reservation. But as it is, all the liabilities on the policies come within the deed of settlement:

Carr's case; Re Waterloo Company, 33 Beav. 544; *Clarke's case*, Albert Arbitration Minutes, p. 788.

With regard to *Lord Digby's case* (*ubi sup.*), and *Murrough and Chamberlain's case* (*ubi sup.*), the man remained a shareholder, and in that capacity was ordered to refund the money he had received.

Napier Higgins in reply.—The contract in the European Company's policies differs considerably from the contracts in the policies in *Carr's* case and in *Clarke's* case. There the policies embodied the deed of settlement, but here that is not so. [Lord Romilly.—I think that that clause in the policy amounts to the same as if it contained the word "alone," to be found in the other cases.]

Lord Romilly.—

I think all that I have to do in this case is to express an opinion upon Lord Westbury's judgment, and Lord Westbury's judgment appears to me to be conclusive in favour of Mr. Doman, because it is stated by Lord Westbury subject to a reservation in favour of Mr. Jackson in this way: he says, "Those circumstances may probably be found to be the insufficiency of the assets of the People's Provident Society to answer all the claims that might be enforced by virtue of that registered memorial against Mr. Doman." And then Mr. Jackson says that those words do not require an answer; there is no replication, and he says that he will take the order in that way. Now I am disposed to think, looking at that, and at Lord Cairns's decision, that that was a decision upon the words of the deed of settlement which I have before me, and that under that deed of settlement he considered that the words of the policy included all the words of the deed. The 125th clause appears to me the clause most favourable to Mr. Doman: "That every seller of shares in the capital of the company shall transfer the same to the purchaser in such manner as the board of directors shall prescribe, either at the office of the company or at such other place as the board shall require, and every seller, immediately after he or she shall in the manner prescribed by the board of directors have transferred his or her shares, and shall have paid all instalments that may then have become due on the shares transferred, shall in respect of such shares cease to be a proprietor of the company, and shall for ever thenceforth be acquitted and discharged from all further obligations in respect of such shares, and from all the covenants, agreements, regulations, and stipulations to which, by the deed of settlement, he or she would have been liable in respect of the same shares if he or she had not transferred the same." I think that that includes the whole. I adopt Lord Cairns's view: I think that there are three classes of debts which are affected in these cases, one of which is not included in the covenant at all: first, there are the regular debts on the policies which are granted; then there are also the guarantee debts; but, in addition to those, there are things which are bought for the sake of carrying on the business of the company, such as that which is sometimes called stationery. The secretary buys a ream of paper, which is taken into the office, and is employed for the purposes of the company. That, I think, is not included; and if there are any debts of that description, no doubt he would be liable for them, unless barred by the Statute of Limitations. The others appear to be included in the deed of settlement. The expressions used by Lord Cairns in his judgment in *Clarke's* case are expressions which I consider

applicable to this case. Lord Cairns's observations appear to me to govern the whole of this case;(a) and Lord Westbury, if he were sitting here and this case were now being argued before him, would no doubt say, "I intended to cover this with the observations that I have already made." I do not think any distinction can be made in respect of the different sort of debt, which Lord Cairns says is of very slight amount, and not of any appreciable value. These are not cases under Lord Westbury's proviso and reservation, and, therefore, his judgment must be taken to be a judgment in favour of Mr. Doman on the point now raised before me, and I shall so declare.

Solicitors for Mr. Doman, *Wood, Street,* and *Hayter.*

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer.*

(a) Lord Cairns.—"It seems to me clear that these gentlemen cannot be put on the list as contributories in respect of the first or the second class of debts, that is to say, debts on policies, and debts on guarantees, where under the deed the liability is limited, and where under the deed the outgoing shareholder on transfer and registration ceases to be liable on the shares. Therefore, these two classes of debts may be put out of the case. It seems to me upon the construction of the deed, and especially the 210th clause, the engagement between the outgoing and the incoming shareholder is this, that the liability of the outgoing shareholder shall determine both as to debts then present, and as to debts afterwards to be incurred, and the whole liability shall be the liability of the new shareholder in respect of those shares. In this case it seems further to me that in substance everything was done, as between the outgoing and the incoming shareholder, to which that 210th clause can apply. Therefore, I repeat that taking the two first classes of debts, it seems to me there is no ground at all for putting the retiring shareholder on the list. A question might arise as to the third class of debts, the general debts, where the liability in point of amount might be unlimited, and not confined to the capital. A question might arise whether in respect of so much of that different class of debts as had accrued before the transfer, the outgoing shareholder would not continue to be liable. But if he were liable (as I have said in the course of Mr. Jackson's argument), it would be the liability of a surety, and the other shareholder in the company, who had come into and was in possession of the shares of the outgoing shareholder, would be the principal debtor, and would be bound without limit of liability to make good anything that the surety would have to pay. That alone would raise a great difficulty as to my sanctioning so useless an operation as putting him on the list in respect of his suretyship. Then there is a further difficulty if he is only to be put on the list in respect of those debts. Before putting him on I should require the official liquidator to show me what the debts of this class were which had accrued before the transfer, in order to see whether there was any appreciable amount in respect of which these transferring shareholders could be put on the list. But the official liquidator informs me in answer to my question, that it would be found that there is no appreciable amount of debts of that class at this time. Then can I put the retiring shareholder on the list in respect of the costs of the winding-up? It seems to me certainly not; because, in order to create a liability for the costs of the winding-up, you must have good reason for putting the retiring shareholder on the list in order to make some payment in respect of debt. It is only because he is found on the list as a person liable to pay some of the debts, that a jurisdiction to make him contribute to the costs would arise. For these reasons I am of opinion that I am not able to put the retiring shareholder, nor in this case the executors of the retiring shareholder, on the list of contributories." (*Clarke's case*).

Dec. 3, 1873; Jan. 6, 1874.

ANGLO-AUSTRALIAN COMPANY'S INDEMNITY CASE.

Life Assurance Company—Amalgamation of companies—Winding-up—Claims for indemnity—Covenant to indemnify not limited to capital of transferee company.

The deed of settlement of the B. P. Insurance Company contained a provision that there should be inserted in every policy or other assurance a provision that the capital should alone be liable on the policies, &c. Another company, the A. A. Company, transferred its business to the B. P. Company, and the amalgamation deed contained an agreement by the B. P. Company to indemnify the A. A. Company in respect of all engagements.

On the B. P. Company being wound-up it was contended that the liability of that company to indemnify the A. A. Company in respect of policies granted by the A. A. Company was limited to the capital of the B. P. Company.

Held, that there was no limitation whatever to the liability.

THIS was a question as to whether the British Provident Society was, under a deed of amalgamation, bound to indemnify the Anglo-Australian Company against all claims without any limitation of liability.

The British Provident Life and Fire Assurance Society was established under a deed of settlement dated the 14th of Dec. 1850, with a nominal capital of 100,000*l.* divided into 10,000 shares of 10*l.* each, and liable to be increased to 1,000,000*l.* The deed contained the following provisions:

Clause 77:

That all assurances against lives or fire and other contingencies, and all other assurances to be granted by the society, shall be effected, and all business of the society shall be done and transacted upon such terms and conditions and in such manner as the board of directors shall think proper.

Clause 80:

That there shall be inserted in every policy or other assurance to be issued and granted by the society, a reference to these presents, and a clause, condition, or provision that the capital and funds of the said society for the time being undisposed of according to the deed of settlement, shall alone be answerable for any claims under such policy, and negativing an unconditional liability,—Provided, always, that nothing herein contained shall limit the liability of any shareholder as to the performance of such contract, or prejudice the right of any person or persons against any such shareholder in respect of such contract, under or by virtue of the statute 7 & 8 Vict. c. 110.

Clause 213:

That every proprietor and member of the society, his or her heirs, executors, and administrators, as between him, her, or them, and the other proprietors of the society, and their respective heirs, executors, and administrators, shall be answerable and accountable and liable for or in respect of the calls, debts, losses, or damages of or upon the society, in proportion to his or her share and interest for the time being of the funds or property of the society, but not further or otherwise.

The Anglo-Australian Company was established under a deed of settlement dated the 9th of Sept. 1853, and containing provisions for the dissolution of the company and for winding it up in such manner as the directors should determine.

Both the companies were duly registered and incorporated under the 7 & 8 Vict. c. 110.

In 1858 the Anglo-Australian Company transferred its business to the British Provident Society. By the deed of amalgamation, dated the 1st June 1858, it was agreed—

First.—That the business and property, effects, liabilities, and engagements of the Anglo-Australian Association as fully set out and particularised in the schedules herennto annexed, including also all the risks and engagements of the life assurance and endowment policies, and also the policies or grants of annuities issued by and now in force of the Anglo-Australian Association, be and are hereby absolutely transferred to, and are, and shall be, undertaken by the British Provident Society. . . .

Thirdly.—That the shareholders of the Anglo-Australian Association shall become shareholders in the British Provident Society, and shall execute the deed of settlement of the said company for the same or any equivalent number or amount of shares as are now held by them in the Anglo-Australian Association, and that thereupon, and in consideration of the said execution by them of such deed of settlement, it is hereby expressly declared and agreed that the moneys or calls already paid by such shareholders (so executing the deed of settlement of the British Provident Society) to the Anglo-Australian Association shall be passed to the credit of such shareholders in respect of the shares which shall be so subscribed for by them in the deed of settlement of the said British Provident Society, and thereupon the said shareholders shall out of the funds and property of the said British Provident Society be absolutely held harmless and indemnified against any and all liabilities in respect of the said Anglo-Australian Association by reason of the execution as shareholders or proprietors by themselves or their lawful attorneys of the deed of settlement of the said Anglo-Australian Association.

By a subsequent deed, dated the 28th Oct. 1858, all the business and assets of the Anglo-Australian Company were transferred by them to trustees for the British Provident Society.

In March 1859 the British Provident Society transferred its business to the British Nation Association, which subsequently in 1865 transferred its business to the European Society.

In Nov. 1859 a petition was presented by Mr. Collins, a shareholder in the British Provident Society, to wind-up the Society. On the 6th March 1861, an order to wind-up was made by Vice-Chancellor Kindersley, and subsequently an official manager was appointed.

A shareholder of the Anglo-Australian Company presented a petition to wind-up that company; and on the 20th Jan. 1860 the petition was dismissed by Vice-Chancellor Kindersley on the ground that the British Provident Society, of which the petitioner was a shareholder, would have to pay all the debts of the Anglo-Australian Company in exoneration of the shareholders of that company.

In June 1860 the Anglo-Australian Company filed a bill against the British Provident Society, praying that they might be ordered specifically to perform their contract to pay the debts and liabilities of the Anglo-Australian Company, and to indemnify that company in respect of such debts and liabilities.

In June 1861, the official manager of the British Provident Society filed a cross bill, praying that the deed of amalgamation of the 1st June 1858 might be declared to have been obtained by fraud and misrepresentation on the part of the Anglo-Australian Company, and that it might be declared void, and that the deed of transfer of the 28th Oct. 1858, might be delivered up to be cancelled. On the 18th Jan. 1862, Vice-Chancellor Stuart made a decree that the official manager of the British Provident Society was bound according to the terms of the said indenture of 1st June 1858, out of the funds and property of the British Provident Society absolutely to hold harmless and indemnify the Anglo-Australian Company and the shareholders thereof against all liabilities in respect of the last-mentioned company by reason of the execution of such shareholders, by themselves or their lawful attorneys, of the deed of settlement of the Anglo-Australian Company.

This case came before Lord Chancellor Westbury on appeal on the 15th April 1862, and he made a decree almost in the same terms: that the official manager of the British Provident Society was bound according to the terms of the indenture of 1st June, 1858, out of the funds and property of the said British Provident Society to save harmless and to indemnify the said Anglo-Australian Company against all liabilities of the said last-mentioned company; the words "and the shareholders thereof," being thus omitted from the previous decree.

By an order made by Vice-Chancellor Kindersley on the 22nd April 1864, on the claim of certain creditors of the British Provident Society, it was declared that the Anglo-Australian Company was entitled to stand as a creditor of the British Provident Society in respect of such debts or liabilities as were undertaken by that society by the deed of amalgamation of the 1st June 1858.

In pursuance of this order all the liabilities of the Anglo-Australian Company were discharged by the official manager of the British Provident Society, except those on certain of the policies mentioned in the schedule to the deed of amalgamation. Messrs. Harman and Pratt were the holders of certain of these policies, and had been declared by Lord Westbury to be entitled to prove on them against the Anglo-Australian Company. That company now applied to have it declared that the British Provident Society were bound to indemnify the company in respect of these claims without any limitation of liability.

Shebbeare (with him *H. M. Jackson*, Q.C.), for the Anglo-Australian Company.—We have an express agreement on the part of the British Provident Society to undertake the liabilities of the Anglo-Australian Company. There is nothing whatever to limit this engagement of the society. It is true that in the *British Nation Indemnity Case* (*sup.* p. 4; Reilly's European Reports, p. 3) Lord Westbury held that the liability of the European Society to indemnify the British Nation Association was limited to the subscribed capital of the society; but there the European deed of settlement contained an express proviso that the subscribed capital of the society should alone be liable to answer claims. Here there is no such proviso. With regard to the *Albert Indemnity Claims* (Reilly's Albert Reports, p. 17), Lord Cairns there held that in some of these cases there was no power to amalgamate. Here there is full power in both the companies to effect an amalgamation. In others of those cases he held there was no intention on the part of the transferee company to undertake an unlimited liability; and if there had been, then they were prohibited by their deed of settlement from doing so. Moreover, here it has already been adjudicated upon by the Court of Chancery, which has decreed that the British Provident Society was bound to indemnify the Anglo-Australian Company.

Napier Higgins, Q.C., and *Montague Cookson* for the British Provident Society.—We do not wish to go behind the decrees of the Court of Chancery. What we contend is, that the indemnity is limited to the capital of the British Provident Society. It was the intention of the amal-

gamation deed so to limit it. Moreover, the deed of settlement of the British Provident Society clearly prohibited the directors from entering into engagements on policies, except with the restriction that the capital was alone to be liable. Clause 80 is conclusive on this point. Thus, this case is covered by the *Albert Indemnity Claims* (*ubi sup.*) and *British Nation Indemnity case* (*ubi sup.*), where the provisions in the deeds of settlement of the transferee companies were to a similar effect, and it was held that an unlimited agreement to indemnify was *ultra vires* of the directors.

Lord ROMILLY.—

This is an application by the Anglo-Australian Company that the British Provident Society may be ordered, by a call to be made on the contributories of the society, to pay the amounts due to George Harman and George Pratt, in respect of the value of their policies, dated respectively the 29th Feb. 1856, and the 28th Nov. 1856, effected with the Anglo-Australian Company, and which by the indenture of the 1st June 1858, were undertaken by the British Provident Society, and that, if necessary, an order may be made for winding-up that society, for the purpose of procuring the necessary funds. The case of the British Provident Society is, that they are liable only to the extent of the indemnity entered into by the deed of June 1858, and that the indemnity thereby provided was confined to the subscribed capital only; whereas the Anglo-Australian Company claim an unlimited liability against the British Provident Society, and, if necessary, an order for winding-up that society in order to provide the necessary funds. And in support of their case, both parties appeal to the decision of Lord Cairns in the Albert Arbitration Indemnity cases (Reilly's Albert Rep. p. 17), confirmed by the decision of Lord Westbury in the present matter. The facts there reported show that Lord Cairns's decision turned upon the terms of the contract, and all his argument tends to show that in a contract, similar to that which is before me, his decision would have compelled the British Provident Society to pay the debts incurred by that society on the policies of Harman and Pratt.

There has been, however, an express decision upon this particular case on a bill filed against the British Provident Society by the Anglo-Australian Company for the specific performance of their contract, which was met by a cross bill by the Anglo-Australian Company, praying that the execution by the British Provident Society of the indenture of the 1st June 1858 might be declared to have been obtained by fraud, and that it was void and ought to be delivered up to be cancelled. The Vice-Chancellor did, by decree in Jan. 1862, declare that the British Provident Society were bound to indemnify the Anglo-Australian Company and the shareholders thereof, in respect of all liabilities of the company by reason of the execution of such shareholders of the deed of settlement of the Anglo-Australian Company, and dismissed the cross bill with costs. By the order of Lord Westbury of the 15th April 1862, on appeal from the decree of the Vice-Chancellor Stuart, the British Provident Society were ordered to indemnify the Anglo-Australian Company against all the liabilities of the said company. By an order of the Vice-Chancellor Kindersley in April 1864, it was declared that the Anglo-Australian Company was entitled to stand as a creditor of the said British Provident Society in respect of such liabilities as were undertaken by the said society by the deed of June 1858. The matter was again brought before Lord Westbury in this arbitration in the month of June last, when leave was given to the said Harman and Pratt to prove for the full amount of their claims, and in case of non-payment to issue a summons for the liquidation of the Anglo-Australian Company. In consequence of that order the Anglo-Australian Company have issued the summons now before me. And the sole question now to be determined is whether the Anglo-Australian Company's liability to pay is limited to the subscribed capital of the British Provident Society, or whether it has no limit at all. Upon looking at the cases, both that which was decided by Lord Cairns, and that which was decided by Lord Westbury, I am of opinion that they support the applicant's case, and that the reasonings and observations, upon which those cases were decided, applied to the facts of this case as they now appear, make out a decision in favour of the Anglo-Australian Company; for Lord Cairns decided it upon the ground that there was not in the Albert case any power to amalgamate, and that the directors acted *ultra vires*, when they attempted to alter the fundamental principles of the original deed by giving to the directors a new authority to cast on the shareholders of the Albert a liability exceeding that which would arise from the amount subscribed on the original shares.

The result is that, in my opinion, the cases before Vice-Chancellor Stuart, Vice-Chancellor Kindersley, Lord Cairns, and Lord Westbury, all substantially point in the same direction, and tend to show that the liability of the British Provident Society, under the deed of June 1858 is, under the events that have happened, an unconditional liability, not limited to the subscribed capital of that society, and I shall make the order applied for accordingly.

Solicitor for the Anglo-Australian Company, *Gover*.

Solicitors for the official liquidator of the British Provident Society, *Mercer* and *Mercer*.

Monday, May 11.

BROWN AND TYLDEN'S CASE.

Company—Winding-up—Petition to wind-up—Companies Act 1862, *s.* 164—*Money ordered to be repaid to a company, where it had been paid by the company between the presentation of the petition to wind-up and the winding-up order.*

The proof of a death was sent to an insurance company on the 8th March 1871, *and the claim on the policy was allowed by the company on the 11th April* 1871, *and it was then arranged that the sum assured should be paid on the 16th June* 1871, *it being a provision of the policy that it was to be paid within three months after satisfactory proof of the death. On the 10th June* 1871, *a petition was presented to wind-up the company. On the 22nd June* 1871, *the policyholders' solicitor applied for payment of the money, and threatened to take proceedings if it were not paid. After further communications a cheque for the sum assured, dated the 20th June, was on the 8th July paid to the policyholders' solicitor, who it was admitted knew of the petition.*

On the 12th Jan. 1872, *the order was made to wind-up the company.*

Held, that the money so paid must be repaid to the company; the payment having been a fraudulent preference of a creditor after the commencement of the winding-up under the Companies Act 1862.

THIS was a question as to the refundment of moneys paid by the directors of the European Society in the interval between the presentation of the petition to wind-up and the winding-up order.

Major A. Brown and the Rev. W. Tylden were the holders of three policies on the life of Mr. John Blyth for 1000*l.*, 500*l.*, and 500*l.* respectively. The policies were originally granted by the Phœnix Life Assurance Company, which subsequently transferred its business to the British Nation Association, which also transferred its business to the European Society.

Mr. Blyth died on the 22nd Feb. 1871, and on the 24th Feb. 1871 Messrs. Brown and Tylden made their claim on the policies against the European Society. A formal proof of the death was sent to the office of the society on the 8th March 1871.

On the 11th April 1871 the proof of the death was admitted by the directors, and the 16th June 1871 was fixed as the day for the payment of the sums assured by the policies, it being a provision in the policies that the sum assured should be paid "within three calendar months after satisfactory proof of the death of the assured shall have been received at the office of the company."

On the 10th June 1871 was presented the petition to wind-up the European Society.

It was advertised in the *London Gazette*, the *Times*, and other papers on the 13th and 14th June 1871.

On the 22nd June 1871 Messrs. Kingsford and Dorman, the solicitors of the policyholders, wrote to the society requesting payment of the sum assured, and stating that otherwise they would be compelled to take proceedings to recover it. On the 23rd June 1871 the petition was heard before Vice-Chancellor Malins, and reports of the case appeared the next day in the newspapers, and on the 28th and 29th June, and the 7th and 8th July 1871 the case was also heard.

On the 1st July 1871 a writ was issued to recover the amount, and on the 3rd July one of the solicitors of the policyholders called at the society's office to serve the writ, and the secretary then requested him not to serve the writ, and assured him that the money would be paid without delay. Accordingly the solicitor refrained from serving the writ, and on the 8th July 1871 the sum assured, with interest (2088*l.* 12s.), was paid to him by the law secretary of the European Society outside Vice-Chancellor Malins's court by a cheque dated 20th June 1871.

The order to wind-up the European Society was not made until the 12th Jan. 1872.

In the winding-up the official liquidator now applied that the money so paid should be paid back to the society.

Napier Higgins, Q.C., and *Montague Cookson* for the official liquidator.--Under the 84th section of the Companies Act, 1862, the winding-up of the society is to be deemed to commence at the time of the presentation of the petition. And under the 153rd section (*sup.* p. 93) all dispositions of the property of the company, made between the commencement of the winding-up and the winding-up order, are to be void. Moreover, the payment was in effect an undue or fraudulent preference of a creditor under the 164th section (*sup.* p. 93). This case differs from the *National Bank's case* (*sup.* p. 92), where Lord Westbury could not impute a knowledge of the petition to the person to whom the payment had been made on the day before the advertisement of the petition in the *Gazette*. Here the money was received by the solicitors of the policyholder, and they were well aware of the proceedings on the petition.

Emmerson's case; Re London Hamburgh, &c., Bank, L. Rep. 2 Eq. 231; 14 L. T. Rep. N. S. 746.

H. M. Jackson, Q.C., and *Everitt* for the policyholders.—In the *National Bank's case* (*sup.* p. 92) Lord Westbury drew attention to the fact that the court ought to protect the discretionary power conferred upon it by the 153rd section. And this is a case in which the court would exercise its discretion in favour of the payee of the money, who may have spent it and be wholly unable to repay it. Moreover, Lord Westbury thought it would be a difficult thing to hold that the payment of a *bonâ fide* debt was a "disposition of the property" of the company. It has been expressly held that *bonâ fide* dispositions of property of a company in the ordinary course of its trade between the presentation of a petition to wind-up and the winding-up order will as of course in the exercise of the court's discretion be confirmed.

Pearson's case; Re the Wiltshire Iron Company, L. Rep. 3 Ch. App. 443; 18 L. T. Rep. N. S. 38 & 40; *Gibbs and West's case*, L. Rep. 10 Eq. 312; 23 L. T. Rep. N. S. 350.

Unless this were the case, the presentation of a petition would paralyse an insurance company; and it was one of the objects of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), to enable an insurance company to carry on its business after the presentation of a petition, in the hopes that it might be sold as a going concern. With regard to the 164th section of the Companies Act, and the contention that the analogous rule in bankruptcy should guide the decision of the court, there is no fraudulent preference here, and in bankruptcy the test is not notice of the petition, but notice of an act of bankruptcy; though the solicitors knew of the petition, the policy-holders knew nothing about it, and they certainly had no knowledge of the insolvency of the company. It was not until the 24th July that the directors admitted the insolvency, and the 10th July was the date on which it appeared in the papers that the Vice-Chancellor held that a *prima facie* case of insolvency had been made out. And it was on the 8th July, before either of these dates, that the money was paid.

Lord ROMILLY.—

I do not think I have any option in the matter. This is a case in which money is paid after petitions are presented to wind-up making violent charges against the company, and, if they are true, the truth of which they must themselves be acquainted with, and which they afterwards admit. I have already had to consider a case of a similar description. What is to be done under the circumstances in a case of money paid to a gentleman who sells out of the army and who has mortgaged the purchase-money? The money is given to Messrs. Cox to pay, and, as everybody knows, the priority of making the claim at Cox's gains the advantage

of the payment. Accordingly, on the morning of the day on which the money is paid it is known that it will be paid; and on that morning Messrs. Cox's Banking House is besieged by persons, who wait till the doors are open for the purpose of putting in their claims on the sum of money. When the bank opens there is a gentleman to receive the claims, and he receives some ten or fifteen, all of them coming in at once. The question in such a case is, who is to be held to be the first. It is asked who was the first to come. All of them coming together or appearing to come together, he says they are all equal, and must all be treated as equal, and you cannot say there is anyone that has priority over the others; and if you were to attempt to do such a thing as that, you would give rise to a lawsuit, because you would have the case of a man who had been perhaps waiting there over-night. Indeed, you cannot specify the time. Now here is a case of a sum of money, which is paid, and which is paid after the petition has been presented a month. If the payment was made at the same moment that the claim was made, no doubt it would assist the case of the applicant. But there is no such thing. It is paid on the 8th July, and the winding-up of the company dates from the 10th June. Well, how is it possible to say that a fraudulent preference in the proper sense of the term was not made? They make a claim on the company; the company says: "Prove the death: you are a creditor; we will pay you, we will give you a cheque." And then they give the cheque which is dated the 20th June. Then on the 8th July it is paid. They were aware there was such a petition presented. The mere accident that the money was not paid two or three days sooner is a misfortune, but it is a misfortune that everybody is subject to, and therefore it is a case in which the person must take the consequences.

Solicitors for the policy holders, *Kingsford* and *Dorman*.

Solicitors for the official liquidators of the European Society, *Mercer* and *Mercer*.

May 14 *and* 18.

Royal Naval Society's Indemnity Case.

Life Assurance company—Amalgamation of companies—Winding-up—Claims for indemnity—Covenant to indemnify limited to capital of transferee company—Amount of proof under a covenant to indemnify—Costs of winding-up the transferor company, probably not all to be paid by the transferee company.

The deed of settlement of the E. Life Assurance Company provided that in every policy and in every contract to be entered into on behalf of the company there should be "a proviso limiting the scope and effect of the contract thereby created, so that the capital stock and funds of the company should alone be liable to answer and make good all claims in respect of any policy of assurance, or policy of guarantee, or other contract as the case might be, and that no shareholder of the company should in any manner be personally liable or subject to any such claims or demands, or be in anywise charged by reason of such policy beyond the amount of his or her share or shares of such capital, stock, or funds." Another clause of the deed provided that the directors might, upon such terms, for such consideration, and in such manner generally as to the directors should seem expedient, purchase the business and property of any other assurance company, and thereupon undertake, pay, or perform all or any of the existing assurances, or other engagements or liabilities whatsoever of such other company, and enter into such indemnities, &c., as should be requisite or deemed expedient for the purpose of effecting the purchase. Another clause gave special powers to the directors for the increase of the business, with a proviso that these powers were not to be exercised so as to alter the provisions of the deed with respect to the liability to losses, so as to render the shareholders liable to such losses, otherwise than in proportion to the amount and number of the respective shares that were held or subscribed for by them in the stock of the company.

This company bought the business of the R. N. Company, and by the deed of transfer it covenanted to satisfy the liabilities of the R. N. Company, and to indemnify the shareholders of that company against such liabilities; and, further, to pay the entire expense of winding-up the R. N. Company, in conformity with the provisions of that company's deed of settlement and with the provisional agreement for amalgamation; with a proviso that the subscribed capital of the transferee company should alone be liable to answer any claims.

The transferor company claimed to be entitled, under the covenant, to an indemnity without limitation of liability against all claims and demands on them. At the hearing they withdrew the claim, and admitted that the indemnity was limited to the capital of the transferee company.

The calls on the shares of the transferor company amounted to 51,000*l.*, *whereas their liabilities were* 168,000*l. They claimed to prove under the indemnity covenant for the whole sum of* 168,000*l.*, *and not for the sum actually paid by them. Their claim was ultimately allowed by the transferee company, subject to the condition that they should not in any case receive more than the* 51,000*l.*, *the amount of their assets.*

The transferor company also claimed to be entitled, under the covenant, to be indemnified in respect of the costs of their winding-up:

Held, that the whole of the costs of winding-up could not be attributed to the failure of the transferee company to abide by its covenant, but that when it could be ascertained how much could be so attributed, then the transferor company might bring in a proof against the transferee company for such sum.

This was a question as to the amount of the liability of the European Assurance Society, under their covenant to indemnify the Royal Naval Military and East India Company Life Assurance Society.

The Royal Naval, &c., Society, was established in 1839, under a deed of settlement containing provisions, which enabled the directors to transfer the business to another insurance company (*sup.*, p. 16; clauses 172, 173).

The European Assurance Society was established in 1854, under a deed of settlement containing the following provisions:

Clause 24 contained a provision for the granting of policies by the directors, provided

That there shall be contained therein, and in every other contract to be entered into on behalf of the company in or about the premises, a reference to these presents, and a proviso limiting the scope and effect of the contract thereby created, so that the capital, stock, and funds of the company, shall alone be liable to answer and make good all claims in respect of any policy of assurance, or policy of guarantee or other contract as the case may be, and that no shareholder of the company shall in any manner be personally liable or subject to any such claims or demands, or be in any wise charged by reason of such policy beyond the amount of his or her shares of such capital, stock, or funds.

Clause 104:

That it shall be lawful for the board of directors specially called for the purpose, to contract for and complete the purchase or acquisition, upon such terms for such consideration, and in such manner generally as to the said board shall seem expedient, of the goodwill or business, and all or any part of the stock, assets, or property of any other company or companies, society or societies, established or created by special Act or Acts of Parliament, or otherwise howsoever, for any purposes or objects, the same as or resembling all or any of the objects or purposes of the company herein set forth, and thereupon to undertake, pay, or perform all or any of the existing assurances, annuities, endowments, guarantees, or other engagements or liabilities whatsoever of such other company or companies, society or societies, and to enter into, make, and execute all such agreements, arrangements, and indemnities, acts, deeds, matters, and things whatsoever, as shall be requisite or necessary, or be deemed expedient for the purpose of effectuating any and every such purchase or other acqnisition as aforesaid, and for such purposes, or any of them to dispose of, or assign, or change the pecuniary funds and capital for the time being of the company, and all or any of such shares in the present or future capital thereof, as by reason of forfeiture, non-allotment, or otherwise, shall, for the time being, be vested in or nnder the control or at the disposition of the board, and to deal with such last-mentioned shares, or any of them respectively, either by altering the amount, value, or denomination thereof, or by subdividing or amalgamating the same or any of them respectively, or by granting peculiar or exclusive rights or privileges or benefits to the holders for the time being thereof respectively, or in any other manner, which to the said board of directors, if and when they shall from time to time be duly authorised as aforesaid, shall appear expedient.

Clause 105:

That an extraordinary general meeting called for the purpose shall (provided two-thirds of the votes at such meeting to be ascertained by show of hands or by ballot as hereinbefore is provided, shall be in favour of the same) have power to increase the business of the company by anthorising the board of directors to undertake and carry on any other business of a similar or kindred nature to those hereinbefore mentioned, which the said board may lawfully undertake and carry on, and also full power to make any laws, regulations, and provisions for carrying into effect such increase of business and generally to make any new laws, regulations, or provisions for or respecting the company, or to amend, alter, or repeal, either wholly or in part, all or any of the laws, regulations, and provisions for the time being of the company, whether contained and expressed in this deed of settlement or made in pursuance of the powers herein contained, subject nevertheless in all cases to the provisions and restrictions of the said Act (7 & 8 Vict. c. 110), and to the proviso hereinafter contained. Provided always that the powers hereinbefore given shall not be exercised so as to affect or alter the provisions of these presents respecting the rateable division of the profits and liability to the losses of the company as between the shareholders, so as to render the shareholders entitled to snch profits or liable to such losses otherwise than in proportion to the amount and number of their respective shares held or subscribed for by them in the capital stock of the company, or so as to affect or alter the provisions hereof for the indemnity of the officers or as to the dissolution of the company.

In 1866 the Royal Naval Society transferred its business to the European Society. The amalgamation was carried out by means of two deeds, both dated the 17th Sept. 1866. One of these deeds, after reciting (*inter alia*) a provisional agreement for amalgamation, and also reciting that certain assets of the Royal Naval Society had by the deed of even date been transferred to the European Society, witnessed that in consideration of the transfer of the assets of the Royal Naval Society, contained in the first part of the schednle to the deed of even date amounting to 83,951*l.* 17*s.* 3*d.*, the European Society thereby covenanted as follows:

They, the said European Society, for themselves, their successors and assigns, with the privity and consent of the directors of the said society, parties hereto of the second part, and they the same directors (so as effectually to bind the same company and the property, and assets thereof; but not so as to undertake hereby any personal responsibility further or otherwise) do respectively grant to and covenant with the said trnstees of the said Royal Society, parties hereto of the third part, their executors, administrators, and assigns, that the said European Society, their successors, and assigns, and the property and assets of the same company, including the assets and property of the said Royal Society assigned or to be assigned as aforesaid as part thereof, shall undertake, and be bonnd by and pay and satisfy all the liabilities on life or annuity policies granted by the said Royal Society, and on foot on the 6th day of August in the year of our Lord 1866, or which having then become claims remained unsatisfied on the same 6th day of August, and all other debts, liabilities, claims, and demands whatsoever present or future, of upon, or against the Royal Society, or the trnstees, directors, or proprietors thereof, except so far as the said policy liabilities and other debts, liabilities, claims, or demands, have since the date of the hereinbefore-recited provisional agreement been paid or discharged by the directors of the said Royal Society as aforesaid, from or out of the assets of the said Royal Society comprised in the said first part of the said schedule to the hereinbefore recited indenture of even date herewith; and also that the said European Society, their successors and assigns shall and will from and out of the property and assets of the said European Society, inclusively of the said assets of the said Royal Society lastly mentioned as part thereof (except as aforesaid), save harmless and indemnify and keep indemnified, the trustees and directors and proprietors of the said Royal Society, and every of them, and their respective heirs, executors, and administrators, and their respective estates and effects, from and against all the said liabilities on life or annuity policies, and other debts, liabilities, claims, or demands respectively lastly hercinbefore mentioned, and from and against all claims and demands, actions, suits, controversies, losses, damages, costs, and expenses in anywise relating to the same liabilities and other debts, liabilities, claims, or demands respectively, or for or on account of any default, neglect, or omission, to discharge or meet the same duly according to law, or any default on account of or in respect thereof. . . . . And further that the said European Society, their snccessors and assigns shall undertake, and shall by and out of the property and assets of the same society (inclusively as aforesaid) bear and pay and discharge the entire risk and expense of winding-up the business and affairs of the said Royal Society in conformity with the provisions of the said deed of settlement of the same society, and with the aforesaid provisional agreement, and do whatever may be requisite to wind-up the same in conformity with snch provisions, and save harmless and keep indemnified the trnstees and directors of the said Royal Society, and all the proprietors of the same society, from all claims, demands, actions, suits, controversies, damages, and expenses, in respect thereof, or in any way consequent on or arising out of the dissolntion of the said Royal Society, or the disposition of the assets, property, or business thereof, or the arrangements with the said European Society in reference thereto, and whether by or on the part of any policyholder, creditor, proprietor, or other person whomsoever.

With the following proviso:

Provided always, and it is hereby declared and agreed by and between the said Royal Society and the European Society, and the true intent and meaning of them, and of these presents, is that the subscribed capital of the said European Society remaining at the time of any claim made in respect of these presents, or by any holders of any policies, or by any annuitant or otherwise, by virtue of any of the covenants, clauses, and agreements herein contained, and the assets and property of the same society (inclusively as aforesaid) shall alone be able to answer such claims; and that no director or other proprietor of the said European Society, his heirs, executors, or administrators, shall by reason of any of the covenants, clauses, or agreements hereinbefore contained, be in anywise individually liable to pay any such claim or claims against the said European Society, beyond the amount of the unpaid part (if any) of his particular share or shares, of the subscribed capital of the said European Society.

On the 12th Jan. 1872, the European Society was ordered to be wound-up, and also on the 1st March 1872, the Royal Naval Society.

The total amount of the liabilities of the Royal Naval Society on policies, &c., with respect to which there had been no novation with the European Society, had been estimated at 168,000*l.* The amount of the unpaid shares of the subscribed capital of the Royal Naval Society was insufficient to meet their liabilities; the sum realised by calls on the shareholders, up to the time of the application, amounted only to 51,448*l.*

It was admitted that the winding-up of the Royal Naval Society was caused solely by the failure of the European Society to provide for the payment of the liabilities of the Royal Naval Society.

The questions for determination were—

1. Whether the liability of the European Society to indemnify the Royal Naval Society against its liabilities was limited to the capital and assets of the European Society, or was wholly unlimited.

2. What amount of proof ought to be made by the Royal Naval Society against the European Society in respect of the indemnity covenant.

3. Whether the European Society was liable in respect of the costs of the winding-up of the Royal Naval Society; and if so, to what extent.

Jackson, Q.C. and *Bevir*, for the official liquidator of the Royal Naval Society.—Considering the decisions of Lords Westbury and Cairns, we do not press the first question as to the liability of the European Society being unlimited. With regard to the second question, the Royal Naval Society is entitled to prove for the 168,000*l.* in full against the European Society; its proof will not be limited to the 51,448*l.* The principle is that in insolvency proof takes the place of payment in solvency; the estate of the Royal Naval Society is really damnified to the extent of the proof against it:

Warwick v. *Richardson*, 10 M. & W. 284;
Cruse v. *Paine*, L. Rep. 6 Eq. 641; 4 Ch. 441; 19 L. T. Rep. N. S. 127.

It is a principle in equity that a man who has entered into a covenant to indemnify another, is bound in equity to anticipate the liability and to keep it from coming on him. As to the third question, though it is true that Lord Cairns, in *Re Albert Indemnity Claims* (Albert Arbitration, Reilly's Rep., p. 17; 16 S. J. 141), decided that none of the costs of the winding-up of the transferor company should be paid by the transferee company, yet Lord Westbury differed from Lord Cairns on this point in the *British Nation Association's Indemnity case* (*sup.* p. 4). Lord Westbury held that some of the costs of winding-up ought to be paid. But here the words are much wider than in those covenants; and all the costs of winding-up ought to be paid.

Napier Higgins, Q.C., and *Montague Cookson* for the official liquidator of the European Society.—With regard to the second question we do not object to the Royal Naval Society's proving for all its liabilities, provided it be settled that it does not get more than the whole of its own assets. If it were a going concern, it would only have 51,448*l.* to meet its liabilities: it therefore could not possibly suffer more damage than this. If it proves for 168,000*l.*, it must not receive more than 51,448*l.* Lord Cairns's decision in the *Albert Arbitration* (*ubi sup.*) is expressly in our favour on the question of the costs of winding-up, that the European Society is under no liability in that respect. But, if any of those costs are to be paid by the European Society, it is clear, as Lord Westbury laid down in the *British Nation Indemnity case* (*ante*, p. 4), that all the costs will not have to be paid. It would then be advisable to wait until it can be ascertained how much of those costs are attributable to the failure of the European Society to abide by its covenant. When that has been ascertained, a proof can be brought in in respect of that portion of costs.

Lord ROMILLY:—

I assent to what Lord Westbury determined in *The British Nation Indemnity Case* (*ante*, p. 4). I think it is quite right that we must wait till the individual costs are carried in to see which are attributable to the indemnity covenant, and which are not; and then you must apportion those costs accordingly, when you have got them. I shall ascertain, when the costs are carried in, which are properly attributable and applicable to the covenant to keep indemnified the trustees, and directors, and proprietors, of the Royal Naval Society from all claims, &c., in respect of the winding up or in any way consequent on, or arising out of the dissolution of the Royal Naval Society, or the disposition of the assets, property, or business thereof, or the arrangements with the European Society in reference thereto, and whether by or on the part of any policyholder, creditor, proprietor, or other person whomsoever.

Solicitors for the Royal Naval Society, *Garrard* and *James*.

Solicitors for the European Society, *Mercer* and *Mercer*.

May 15 *and* 18.

LINES'S AND LEAH'S CASES; DEAS'S CASE.

Life assurance company—Winding-up—Amalgamation of companies—Concurrent proof on policies—Novation—Covenant to indemnify—Claim disallowed of concurrent proof on a policy against both of two amalgamated companies — Official liquidator of transferor company to make one proof of its liabilities against transferee company under an indemnity covenant.

On the amalgamation of two insurance companies the transferee company covenanted to indemnify the transferor company in respect of the liabilities on its policies, &c.; in the winding-up of the two companies the policyholders of the transferor company claimed to be entitled to prove concurrently against both companies.

Held, that the policyholders must not prove against the transferee company individually, but that the official liquidator of the transferor company must bring in one proof in respect of all its liabilities against the transferee company under the indemnity covenant.

Whatever might be the rights of the individual policyholders, this was held to be the most convenient course, and under the extensive powers of the arbitrator contained in the European Arbitration Act he ordered this course to be adopted.

THIS was a question as to whether the proofs on policies against a transferee insurance company should be made by the policyholders individually or *en bloc* through the official liquidator of the transferor company.

The facts of *Lines's case* are set forth in pages 151-4 *sup.* The policyholder effected his policy with the Waterloo Company in 1854, and in 1862 that company transferred its business to the British Nation Association, which in 1865 transferred its business to the European Society. Lord Romilly held in *Lines's case* (*sup.* 151) that the omission of Mr. Lines to prove in the winding-up of the Waterloo Company, which was advertised in 1863, must be taken to show his intention to abandon his rights against that company. He now claimed to be entitled to prove against the British Nation Association, and also against the European Society.

The deed of amalgamation between the British Nation Association and the European Society contained the following covenant:

And this indenture lastly witnesseth that in consideration of the union amalgamation or consolidation aforesaid and of the premises, the European Society doth hereby for itself, its successors and assigns, covenant with the British Nation Association that the European Society, its successors or assigns, will from and after the execution of these presents undertake, pay, or perform all and every of the existing bond and other debts, assurances, annuities, endowments, guarantees, and other engagements or liabilities of the British Nation Association, and will at all times hereafter save, defend, and keep harmless and indemnified the British Nation Association and the individual proprietors of shares in the capital thereof from and against all actions, suits, proceedings, costs, damages, claims, and demands whatsoever for upon account in respect of the same, all, any or either of them or otherwise in relation thereto respectively.

Mr. Lines alleged that he had no notice whatever of this amalgamation, and that he never received any notices of renewal of his policies from the European Society.

Leah's case differed from *Lines's case* in this respect, that on the 27th Sept. 1866, Mr. Leah sent in his policy to the European Society, and it was returned to him with the following endorsement placed on it by the society:

(British Nation) 140.

It is hereby declared that subject to the proviso hereunder stated the funds and property of the European Assurance Society of London, as provided for in the deed of settlement of the said society, shall be liable for the due payment of the sum of 100*l.*, with profits assured by the within policy with the British Nation Life Assurance Association of London to the person or persons legally entitled to receive the same.

Provided always that the future premiums payable in respect of the said policy be duly paid to the said European Assurance Society at the times and in the manner set forth in the said policy.

Mr. Leah now made the same claim as Mr. Lines.

DEAS'S CASE.

In this case Sir David Deas held a policy originally granted by the Royal Naval Society. On the amalgamation of that society with the European Society in 1866, he had received the amalgamation circulars (*vide sup.* p. 110), and had subsequently paid his premiums to the European Society, and accepted receipts from them. He claimed to be entitled to prove concurrently against both societies, the Royal Naval and the European.

The deed of amalgamation between the Royal Naval and European Societies contained the following covenant:

And they the same directors (so as effectually to bind the same European Society and the property and assets thereof, but not so as to undertake hereby any personal responsibility further or otherwise) do respectively grant to and covenant with the said trustees of the said Royal Naval Society, parties hereto of the third part, their executors, administrators and assigns, that the European Society, their successors, and assigns, and the property and assets of the same company, including the assets and property of the said Royal Naval Society, assigned or to be assigned as aforesaid as part thereof, shall undertake and be bound by and pay and satisfy all the liabilities on life or annuity policies granted by the said Royal Naval Society and on foot on the 6th Aug. in the year of our Lord 1866, or which having then become claims remained unsatisfied on the same 6th Aug. And all other debts, liabilities, claims, and demands whatsoever, present or future, of upon or against the said Royal Naval Society, or the trustees, directors, or proprietors thereof, except so far as the said policy liabilities and other debts, liabilities, claims or demands, have since the date of the hereinbefore recited provisional agreement been paid or discharged by the directors of the said Royal Naval Society as aforesaid from or out of the assets of the said Royal Naval Society, comprised in the first part of the said schedule to the hereinbefore recited indenture of even date herewith. And also that the said European Society, their successors, and assigns, shall and will from and out of the property and assets of the said European Society, inclusively of the said assets of the said Royal Naval Society lastly mentioned as part thereof (except as aforesaid), save harmless and indemnify and keep indemnified the trustees, directors, and proprietors of the said Royal Naval Society and every of them, and their respective heirs, executors, and administrators, and their respective estates and effects from and against all the said liabilities on life or annuity policies and other debts, liabilities, claims, or demands, respectively lastly hereinbefore mentioned, and from and against all claims and demands, actions, suits, controversies, losses, damages, costs, and expenses, in anywise relating to the same liabilities, and other debts, liabilities, claims or demands, respectively, or for or on account of any default, neglect, or omission to discharge or meet the same duly according to law, or any default on account of or in respect thereof.

The Act under which the Arbitrator sits, The European Society's Arbitration Act 1872, contains the following provision:

Sect. 8:

The arbitrator may settle and determine the matters by this Act referred to arbitration, not only in accordance with the legal and equitable rights of the parties as recognised in the courts of law or equity, but on such terms and in such manner in all respects as he in his absolute and unfettered discretion thinks most fit, equitable, and expedient, and as fully and effectually as could be done by Act of Parliament.

De Gex, Q.C. and *Horton Smith*, for Mr. Lines and Mr. Leah, contended that the British Nation Association had made itself liable on the policies, and that there was no novation with the European Society. The liability of the European Society was cumulative, and not substitutional in lieu of that of the British Nation Association. Thus the British Nation Association was liable on the policy as principal, and the European Society as surety. Accordingly Lines is entitled to bring in his proof

concurrently against both companies. This was what Lord Westbury laid down in *Harmen's case* (*sup.* p. 129). See also

Carr's case, Re the Waterloo Life Assurance Company, 33 Beav. 542;
Harris v. *Farwell*, 15 Beav. 31;
Scott's case, sup. p. 109;
Ex parte Honey, Re Jeffery, L. Rep. 7 Ch. 178; 25 L. T. Rep. N. S. 728.

Napier Higgins, Q.C. and *Montague Cookson* for the official liquidator of the European Society.—There was a novation of the contract: the liability of the European Society was substituted in place of that of the British Nation. The receipt of this bonus circular was just as effectual as the receipt of the bonus itself would have been: (*Allen's case*, Reilly's Albert Rep., p. 127; *Glazebrook's case*, Reilly's Albert Rep., p. 135). It would be hard on the British Nation Association, if, because they happened to act as agents of the Waterloo for three years, they are to be liable to the British Nation for the full value of the Waterloo policies, extending over a large number of years. However, if there was no novation, the claim of the policyholder against the European must be under the covenant to indemnify, contained in the amalgamation deed. This claim can be brought but once. And as the official liquidator of the British Nation makes a claim under the covenant in respect of all its liabilities, the individual policyholder cannot make further separate claims in respect of the same liabilities. The covenant is a general covenant to indemnify one company by another; and was not intended to operate as an individual covenant in respect of all the policyholders individually. The powers of the arbitrator, under the European Society Arbitration Acts, are very large, and are sufficient to enable him to direct the proofs to be made once for all by the official liquidator, if that shall seem the most advisable course.

John Pearson, Q.C. and *George Law* for Sir David Deas.—We claim a concurrent proof against both the Royal Naval and the European Societies. However, we do not raise any great objection to the liquidator proving for us, if it be settled that we are not to be in any worse position than if we had proved individually. We rely not only on the covenant, but on the amalgamation circular, guaranteeing the policies of the transferor company. This created a separate contract with each individual policyholder; and these contracts ought to be enforced separately, and not *en bloc*.

Lord ROMILLY:—

These cases have been very fully and elaborately argued, and, to say the truth, I do not think there is now much to decide. I have decided that there is no question of novation, and consequently, so far as it is a question of novation, this is in Mr. De Gex's favour. I also decided that there was a proof to be made; but then the next question which was raised by Mr. Higgins was, by whom is the proof to be made? If the proof is to be made by each person individually, there will be every species of conflict between them. One party may claim 1000*l.* for the mere purpose of settling, and another party may say, you are only to claim 800*l.*; and consequently contests would arise between the persons who prove. I was satisfied in a very short time that that would be very likely to happen, and would be a very serious evil. It was also admitted that there could be but one proof in respect of this one indemnity; and then it was suggested to me that by my powers under this Act, which creates my authority, I may do as I think fit upon the subject. Accordingly I adjourned the case until to-day, in order to consider what powers I had under the Act, because I was quite convinced it would be a serious evil to have a contest between the parties as to the amount of proof, when the proof ought to be settled once for all. Though assenting to Mr. De Gex's argument in one respect, in other respects I think he fails, and there ought only to be one proof.

Upon looking into the Act I find certain clauses which are very satisfactory as to my powers. The 8th clause of the Act, I think, is very decisive: "The arbitrator may settle and determine the matters by this Act referred to arbitration, not only in accordance with the legal and equitable rights of the parties as recognised in the courts of law or equity, but on such terms and in such manner in all respects as he in his absolute and unfettered discretion thinks most fit, equitable, and expedient, and as fully and effectually as could be done by Act of Parliament." That gives me power to do anything I think fit upon that subject. I think there ought only to be one proof made, and that proof ought to be made by the joint official liquidator. Therefore, if you dispute about the claims, it must be brought before me in another form. I shall determine that in respect of the indemnity there is only to be one proof made by the official liquidator for the whole of the indemnity which the European has guaranteed to the Royal Naval Society.

Higgins.—And so with the other indemnity.

Pearson.—If the official liquidator makes the proof, the policyholders ought not to be in a worse position than if they had carried in their own claim against the European Society. If that is not done, we may make an application.

Lord ROMILLY.—You may make an application, if you do not think the proof includes as much as you are entitled to.

Solicitor for Messrs. Lines and Leah, *Charles Wellborne.*

Solicitors for Sir David Deas, *Hussey* and *Hulbert.*

Solicitors for the official liquidator of the European Society, *Mercer* and *Mercer.*

June 18 *and July* 8.

TALBOT'S CASE; VIVIAN'S CASE.

Life assurance company—Amalgamation of companies — Winding-up — Novation of contract—Indorsement on policy—Mortgage of policy—Policyholder held after an amalgamation to be a creditor, not of the transferor company, but of the transferee—Mortgagee in no better position than mortgagor with respect to novation.

On the transfer of the business of the I. Life Assurance Company to the E. Life Assurance Company, a circular was received by a policyholder in the transferor company announcing the transfer and stating that the transferee company were ready to issue their own policies in exchange for those of the transferor company "without altering or limiting any of the terms or conditions on which those policies had been issued"; moreover those policyholders "who might wish to have their

policies simply indorsed so as not to disturb any legal instruments with which they might be incorporated might have them so indorsed and in a manner which would fully secure the responsibility and guarantee of the transferee company for the payment of all claims under the policies."

Thereupon the policyholder sent in his policy to the transferee company, who placed upon it an indorsement, whereby in consideration of the policyholder "agreeing to the transfer of the E. company, and to pay to that company all the future premiums," &c., the transferee company agreed to observe and perform all the stipulations in the policy contained on behalf of the transferor company.

Subsequently he paid his premiums to the transferee company and accepted receipts from them.

In the winding-up the policyholder claimed to be entitled to prove on his policy against the transferor company, but it was

Held that there had been a novation with the transferee company; the indorsement clearly showing that that company's liability was in substitution for, and not in addition to, that of the transferor company.

Where the policy has been mortgaged, and the mortgagee receives no notice of the amalgamation, but the mortgagor receives the amalgamation circular, and then has the policy indorsed and pays the premium to the transferee company and accepts receipts from them, the mortgagee is in no better position than the mortgagor, and there will be a novation, just as if there had been no mortgage.

THIS was a question of novation.

The India and London Life Assurance Company was established by a deed of settlement dated the 16th April 1846, and on the 25th April 1846 it was duly registered and incorporated under the 7 & 8 Vict. c. 110. The deed contained *inter alia* the following provisions:

Clause 163—

That an absolute and entire dissolution of the company may take place by and with the consent and approbation of three-fourth parts at least in number of the directors for the time being, and to be testified by some writing to be signed by them, and also with the consent and approbation of four-fifths at least of the votes of the shareholders to be respectively present at two successive extraordinary general meetings, the second of such meetings to be at the distance of three calendar months at least from the first meeting, and each meeting to be respectively convened by one month's notice for that purpose in the *London Gazette*, and in the outer office of the company; and that if at any ordinary general meeting the company appear by the accounts rendered as hereinbefore provided to have sustained losses and incurred expenses amounting in the whole to one-tenth part of the nominal capital of the company, the directors shall forthwith convene an extraordinary general meeting for the purpose of determining upon the propriety and expediency of dissolving the company, and at such extraordinary general meeting a majority of votes present thereat may resolve on the dissolution of the company, and fix a day for the dissolution thereof, and that no dissolution shall take place by any other mode.

Clause 164—

That after a resolution that a dissolution shall take place, the company shall cease to grant any new assurances, and proper measures for the purpose of effecting such dissolution without prejudice to the rights of the parties then assured shall be taken by a committee to be composed of the directors for the time being of the company and of an equal number of persons to be chosen by the proprietors, and five persons of each class shall be a quorum of that class to transact business and bind the class they represent; and thereupon the affairs and concerns of the company shall with all convenient speed be wound-up and the debts and liabilities of and claims on the company to be satisfied, repurchased, discharged, or otherwise sufficiently provided for by investment or by transfer to other existing and approved assurance offices, or in such other manner and by such other means as may then be agreed on, and the balance, if any, of the assets of the company, and also any future surplus remaining, after satisfying outstanding demands, shall be divided among the persons who are proprietors at the period of dissolution, and their respective executors, administrators, and assigns in proportion to the amount at that time of their respective shares.

The European Assurance Society was established under a deed of settlement dated the 2nd Sept. 1854.

In 1860 the India and London Company, under an agreement dated the 21st Feb. 1860, transferred their business to the European Society. By the agreement the European Society undertook to indemnify the India and London Company against their liabilities on their policies, the renewal premiums were to be paid to the European Society, and the India and London Company were to pay 14,600*l.* to the European Society.

Mr. George Talbot was the holder of a policy, granted to him on his own life by the India and London Company in 1850, whereby, if the premiums were duly paid, on his death "the funds or property of the company were to be subject and liable according to the company's deed of settlement, to satisfy and pay unto the executors" the sum of 1200*l.*

On the transfer of the business Mr. Talbot received the following circular from his company:

India and London Life Assurance Company,
2, Waterloo-place, Pall-mall, S.W.,
29th Feb. 1860.

To ——

Sir,—The directors of the India and London Life Assurance Company beg to state that they have entered into an arrangement to transfer the policies issued by them to the European Assurance Society. The existing annual revenue of that society exceeds one hundred and twenty thousand pounds, its assets exceed a quarter of a million, the subscribed capital amounts to two hundred and fifty thousand pounds, and it has a most numerous, influential, and wealthy body of shareholders. Its business also is rapidly increasing, and the plan of the society offers to the insured a greater probability of speedily reaping a bonus than smaller companies, the ratio of whose expenses to their income necessarily forms a considerable tax on their resources. The European Assurance Society is empowered by a special Act of Parliament, and is prepared to issue its own policies in exchange for those of this company, without altering or limiting any of the terms or conditions on which our policies have been issued. Those parties who may wish to have their existing policies simply endorsed, so as not to disturb any legal instruments with which they may be incorporated, may have them so endorsed, and in a manner which will fully secure the responsibility and guarantee of the European Society for the payment of all claims under the policies. For this purpose all communications should be addressed to William Cleland, Esq., the manager of the European Assurance Society, who, in conjunction with the Board of Directors, is empowered to act in this matter. The directors of the India and London Life Assurance Company believe that in taking the present step they are decidedly promoting the interests of their policyholders, and they trust that the assured will view it in the same light, and see that the change is one undoubtedly for their advantage.

JOHN J. JERDEIN,
Chairman of the India and London Life Assurance Company.

At the same time he also received the following circular from the European Society:

Sir,—The annexed letter from the India and London Life Assurance Company will inform you of the fact of an agreement having been entered into for a transference

of its policies to this society. Enclosed is a prospectus and list of shareholders, and you cannot fail to perceive that the proprietary body is exceedingly numerous, and includes a very unusual number of gentlemen in the principal manufacturing and commercial districts of England, of known wealth, reputation, and influence, and to this circumstance is no doubt in a great measure due the success of the society. The society is empowered by special Act of Parliament and is the only life assurance and fidelity guarantee society whose policies of guarantee are to be accepted by the Government and its departments. The subscribed capital is 250,000*l.* The uncalled-up capital exceeds 180,000*l.* The revenue exceeds 120,000*l.* per annum, and the assets are upwards of a quarter of a million sterling. With these resources there can be no doubt of the advantages to be derived by the policyholders over those of many other companies. These advantages are briefly but clearly set forth in the accompanying prospectus. The board of directors will give every facility for exchange or indorsement of your policy, and it is hoped that by the continuance of that prompt and honourable dealing which has throughout been characteristic of this society, we may succeed in securing your cordial co-operation in augmenting its prosperity and increasing its connections. The enclosed documents show the progress and position of the society, but every additional information may be at once obtained on application to the manager.

HENRY WICKHAM WICKHAM,
Chairman of the European Society.
WILLIAM CLELAND, Manager.

Mr. Talbot, acting on the circular of the India and London Company, sent in his policy to the European Society's office on the 28th June 1860, and it was subsequently returned to him with the following endorsement printed upon it by the European Society:—

In consideration of the within-named George Talbot agreeing to the transfer of this policy to the European Assurance Society, to pay to that society all the future premiums as they become due, and to observe and perform all the stipulations contained therein on his part, we, on the part of the European Assurance Society, do hereby agree to observe and perform all the stipulations therein contained on behalf of the India and London Life Assurance Company. It is also declared that the capital stock, or so much thereof as for the time being shall have been subscribed, and the other stocks, funds, securities, and property of the said society remaining at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands in pursuance of the trusts, powers, and authorities, contained in the deed or deeds of settlement of the said society, shall alone be liable to answer and make good all claims and demands upon the said society under or by virtue, or in respect of the within-written policy, and all other policies, and that no director, proprietor, or member of the said society, his heirs, executors, or administrators shall, by reason of any policy of assurance or instrument securing annuities or of the whole of the policies of assurance and instruments securing annuities taken together, which any director has signed or may sign, be in any wise individually or personally liable or subject to any claims or demands against the said society beyond the amount of the unpaid part of his particular share or shares in the said capital, stock, or in such part of the said capital stock as for the time being shall have been subscribed.

Dated this 28th day of June 1860.

JOHN HEDGINS, } Directors of the European
JOHN MOSS, } Assurance Society.
W. CLELAND, Secretary.

Printed receipts for renewal premiums issued from the chief office will alone be admitted as valid.

Henceforward Mr. Talbot paid his premiums to the European Society, and accepted receipts from them. Before the amalgamation the policy was referred to in the India and London receipts as No. 473. Afterwards the number was 26,145, the receipt being as follows:

European Assurance Society.

Received the sum of £23 11s. for one year's premium, from the 6th March 1865 on policy No. 26,125.

On the 12th Jan. 1872 the European society was ordered to be wound-up, and on the 20th April 1872 also the India and London Company. In the winding-up Mr. Talbot claimed to be entitled to prove on the policies against the India and London Company. The official liquidators, on the other hand, contended that there had been a novation with the European Society, and that that society alone was liable on the policy.

Waller, Q.C. and *Joseph Beaumont* for the policyholder.—This case is governed by the decisions of Lord Westbury. [Lord ROMILLY.—I have changed my opinion very much since I have seen the effect produced by the results of Lord Westbury's decisions. I have not followed his decisions latterly.] The reasons given by Lord Westbury in some of his judgments are certainly good law, and are applicable here. We admit that the European Society had power to purchase the business of any other life assurance company. But it was not within the power of the India and London Company to transfer their policyholders to another company. They did not even hand over to the European Society all their assets; what they did was to get the European Society to undertake the liability in consideration of a gross payment of 14,600*l.* from the India and London Company. The amalgamation agreement was an agreement merely as between the two companies; it was quite regardless of the policyholders and other creditors, and consequently did not affect them. From the amalgamation circulars Mr. Talbot inferred, as anyone else would have done, that all that was proposed to be done was to give him the responsibility and guarantee of the European Society, in addition to, and not in substitution for, what he then had. If the circulars meant anything else, they were calculated to mislead. It was on this understanding that the premiums were paid to, and the receipts accepted from, the European Society. The amalgamation circular, after stating that an arrangement for the transfer has been entered into, says: "The European Assurance Society is empowered by a special Act of Parliament, and is prepared to issue its own policies in exchange for those of this company *without altering or limiting any of the terms or conditions* on which our policies have been issued. Those parties who may wish to have their existing policies simply indorsed, so as not to disturb any legal instrument with which they may be incorporated may have them *so indorsed, and in a manner which will fully secure the responsibility and guarantee of the European Society for the payment of all claims under the policies.*" The principles applicable in these cases of novation were distinctly enunciated by Lord Westbury (*sup.* pp. 30, 31). They are illustrated in *Blundell's case* (*sup.* p. 39), and *Coghlan's case* (*sup.* p. 31). In *Scott's case* and *Hort's case* (*sup.* p. 109) there was an indorsement just as in this case, and there was no novation. See also *Grain's case* (*sup.* p. 15), *Wilson's case* (*sup.* p. 158), and *Kelly's case*, (*sup.* p. 91).

Napier Higgins, Q.C., and *Montague Cookson* for the official liquidator.—The India and London Company had power to make a transfer of their business under the 164th clause of their deed of settlement: (See *Carr's case*, 33 Beav. 542.) Even assuming that Lord Westbury's decisions are binding, this case differs from those that were cited. In most of the cases there was no indorsement and in

Scott's and *Hort's cases* (*ubi sup.*), where there was an indorsement, the amalgamation circular was of a peculiar character, wholly different from the amalgamation circular here. It was from the terms of the circular that it was inferred that the understanding was that there was to be no new contract. That cannot be inferred in this case. The indorsement, taken with the amalgamation circulars, conclusively shows that a new contract was entered into. Reference was also made to

Glanfield's case (*infra*, p. 177);

Dufaur v. *Professional Life Assurance Company* (25 Beav. 599).

Vivian's case was like *Talbot's* case, except that Gordon, who effected the policy, had in 1852 mortgaged it to Vivian; and notice of the mortgage was sent to the India and London Company; and that the indorsement on the policy was different, being as follows:

It is hereby declared and agreed that the funds and property of the European Assurance Society of London, provided for in the deed of settlement of the said society, shall be liable for the due payment of the sum of 200*l.* assured by the within policy with the India and London Assurance Company of London, to the person or persons legally entitled to receive the same at the death of the within named Abercombie Lockhart Gordon. Provided always that the future premiums payable in respect of the said policy, be duly paid to the agent for the time being of the said European Assurance Society, at the times and in the manner set forth in the said policy.

The circulars were sent to the mortgagor; but the mortgagee never received them or knew anything about the transfer. The premiums were paid to the transferee company by the mortgagor. The mortgagee had died, and his executrix now claimed against the transferor company.

Jackson, Q. C. and *Methold*, for Vivian's executrix, made use of the same arguments as those in *Talbot's* case; moreover, they said that the rights of the mortgagor could not be affected by what was done, for he never was cognisant of any of the transactions. Whatever may be the meaning of the indorsement in *Talbot's* case, the indorsement here certainly does not indicate a new contract.

Napier Higgins Q. C., and *Montague Cookson*, for the joint official liquidators.—The mortgagee can be in no better position than the mortgagor: (*Werninck's case*, Reilly's Albert Reports 101; 15 S. J. 767.) You must consider the whole of the circumstances—the circulars in connection with the indorsement. The circulars showing that there was to be a transfer out and out from one company to the other, the mere terms of the indorsement are comparatively of slight importance.

Reference was made to

Conquest's case (*sup.* p. 67);

Dale's case, Reilly's Albert Reports 11; 15 S. J. 886;

Kennedy's case, Reilly's Albert Reports 5; 15 S. J. 729.

Judgment was reserved until the 8th July.

Lord ROMILLY.—

Talbot's case is one of those of which so many have had to be decided in this arbitration, namely, on the subject of novation. The policy is an ordinary life policy, bearing date the 16th April, 1846; it was transferred under an arrangement entered into by the directors of the India and London Life Assurance Company with the European Assurance Society. On this occasion a circular, a copy of which is set out in the case, was sent to the claimant, George Talbot. In June 1860, Mr. Talbot left his policy at the office of the European, whence it was returned to him with an indorsement sealed and signed by two of the directors and the secretary of that society. Mr. Talbot thenceforward paid the premiums due on the policy to the European, and received their receipts for the same. In 1872 the society was wound up by an order of January of that year, made by the Vice-Chancellor Malins. The proof of Mr. Talbot against the European Society is admitted. The question I have to determine is, whether since the year 1860 he is not a party to, and bound by the agreement entered into in June 1860 with the directors of the European Assurance Society. The decisions on this point are very numerous and somewhat contradictory; and it was of some importance to review them generally, so as to afford for the future a fixed and regular course of decision. The principal decisions on this subject are Lord Westbury's on the one hand, and Lord Cairns's on the other. An examination of the decisions put me in a considerable difficulty; and I endeavoured for a long time to discover some plan by which I might reconcile them all, but I found this impossible, and a more minute examination which I have subsequently made of them, only confirms me in a feeling of this impossibility. Having arrived at the conclusion that it is necessary that I should follow either Lord Cairns or Lord Westbury, I have also come to the conclusion that I must follow Lord Cairns. It certainly is with great regret and great diffidence that I dissent from Lord Westbury. But there is a case, *Pratt's case*, (*sup.* p. 129), which I find totally impossible to separate from *Talbot's* case. If I found *Pratt's* case had been followed by Lord Westbury in several cases thoroughly argued before him, I should have been placed in a very great difficulty between the manifest importance of uniformity of decision on the one hand, and the difficulty of reconciling all the cases on the other. But this is not so. *Pratt's* case was decided by Lord Westbury on the last day but one of his sitting; he was notoriously unwell at that time, and I doubt whether he had present to his mind all the consequences of that decision, or how he could reconcile it with the views he had stated in some of his former decisions with respect to novation. I have been unable to reconcile it myself, and I have thought it my essential duty to look at these cases of Lord Westbury's, *de novo*, as if they had come before me for the first time; and I cannot but think that the acts done by Mr. Talbot constituted a distinct novation, and constituted a fresh contract with the European Society. If this view of mine unsettles decisions I regret it very much, but I am afraid this is inevitable.

In *Talbot's* case the indorsement says that in consideration of the assured having agreed to a transfer of his policy to the European Society, that company had agreed to perform the stipulations of the policy on behalf of the company by whom it was issued. These words seem to me to amount, not to an addition, but to a substitution. The cases which have come before the Court of Chancery point in the same direction. The principal case as to an indorsement is *Griffith's case* (L. Rep. 6 Ch. 380). Lord Justice James there explains in his judgment his views of the construction of such an indorsement. There are also *Dale's case* (Reilly's Albert Rep.; 16 S. J.), and *Hawtrey's case* (Reilly's Albert Rep.; 16 S. J.) The result is that the mass of judicial authority is

too strong for me not to hold that there is a novation in *Talbot's* case.

From the views I have expressed, it follows that I adopt the same principle in *Vivian's* case. A point was raised in this latter case that the mortgagee had some separate rights, and was in a better position than the mortgagor; but this point was decided by Lord Cairns in the *Albert* cases.

Lord Westbury seems to have held in *Blundell's* and *Coghlan's cases* (*sup.* pp. 39 and 31) and in one or two other cases, that the three parties must concur and all join together to make a fresh contract in order to constitute novation. Now, I shall not hold that doctrine; it is not doctrine that I think is to be found in the cases.

Lord Westbury was apparently swayed by the hope of giving two funds to pay the creditor, but the result will be, as far as I can judge, that the creditor will, in many instances, be thrown on a fund where there are no assets at all to pay him. However that may be, I must look rather at what is right in law, and not speculate on whether the consequences will give a greater or a smaller fund to the creditor.

I must hold in these cases that there is a novation, where it is a *bonâ fide* contract, as it is in my opinion here; and I must hold that the claimant is not entitled to prove against the India and London Company. That is the consequence which results from the view I have taken.

I am sorry to say I dissent from Lord Westbury in several cases which he has expressly decided on this question of novation.

Solicitor for Mr. Talbot, *W. A. Day.*

Solicitor for Mr. Vivian's executrix, *T. D. Bolton.*

Solicitors for the official liquidator, *Mercer* and *Mercer.*

Monday, August 3.

Benjamin Smith's Case; Glanfield's Case.

Life assurance company—Amalgamation of companies—Winding-up—Novation of contract—Bonus—Indorsement on policy.

Policyholder held after an amalgamation to be a creditor, not of the transferor company, but of the transferee.

In 1858 *the H. Life Assurance Company transferred its business to the J. Life Assurance Company, which subsequently in* 1861 *transferred its business to the B. Life Assurance Company, which in its turn in* 1865 *transferred its business to the E. Life Assurance Company. S. was a policyholder of the H. Company, and on their transfer of business he received a circular from that company, announcing the amalgamation, and stating that the effect of the amalgamation would be to give the increased guarantee of the J. Company, the policy being now guaranteed by the J. Company, "upon precisely the same conditions and provisions as it stood before;" he also received a certificate certifying that the policy was guaranteed by the J. Company, and that the sum assured would by paid out of the funds of that company.*

On the J. Company's transfer of business, S. received from that company a circular announcing the fact, and stating that the terms and conditions contained in the policy would remain unaltered by the arrangement, and that the policyholder was fully guaranteed for all claims under his policy by the B. Company, under the deed between the two companies, but that any of the assured desiring it, could have an endorsement to that effect, made on their policies; moreover, that all the assured would have the security of the large annual business of the joint business, but that in all future bonuses they were to participate on an equality with the other policyholders in the conjoint companies; and that they would thus secure, not only all the benefits to which they were entitled in the J. Company, but the additional benefit to be derived from the accumulation of income and power.

Subsequently to each transfer of business he paid his premiums to the transferee Company, and accepted their receipts. Moreover, in 1863, *the B. Company declared a reversionary bonus on his policy, and sent him a circular informing him of the fact, and in* 1867 *the E. Company did the same. No notice was ever taken of the circulars, and no endorsement was ever placed on the policy.*

On the policyholder's claiming, in the winding-up of 1872, *to be entitled to prove on his policy, it was*

Held that there had been a novation, and that the H. Company were under no liability on the policy.

Where the facts were the same as these, with the addition that the policyholder had allowed the B. Company to place on the policy an endorsement whereby in consideration of the assured having agreed to the transfer of the policy to the B. Company, and to pay all future premiums to that company, the B. Company agreed to perform all the stipulations contained in the policy on the part of the J. Company, and in the stead of the J. Company, it was à fortiori

Held that there had been a novation.

This was a question of novation.

The Householders' and General Life Assurance Company was constituted under a deed of settlement dated the 3rd March 1852.

The English and Irish Church and University Assurance Society was constituted under a deed of settlement dated the 27th June 1853.

The British Nation Life Assurance Association was constituted under the statutes 7 & 8 Vict. c. 110, and 10 & 11 Vict. c. 78, by deed of settlement dated the 28th Feb. 1855. (See Clauses 30, 45, 46; *sup.* p. 40.)

The European Assurance Society was established under a deed of settlement dated the 2nd Sept. 1854.

In 1858 the Householders' Company transferred its business to the English and Irish Church Company.

In 1861 The English and Irish Church Company transferred its business to the British Nation Association.

In 1865 the British Nation Association transferred its business to the European Society: (See Amalgamation Agreement, *sup.* p. 41.)

In 1852 The Householders' Company granted two policies to Mr. Benjamin Smith on the joint lives of himself and his wife.

On the amalgamation of The Householders' Company with the English and Irish Church Company in 1858, Mr. Smith received the following circulars and certificate:—

Householders' and General Assurance Company,
15 and 16, Adam-street, Adelphi, London,
September, 1858.

SIR,—I have to inform you that it has been duly resolved to amalgamate this company with the English and Irish Church and University, and the Engineers' Assurance Societies, and that the business of the united companies will henceforth be conducted at No. 345, Strand, London.

The effect of this amalgamation will be to give you the increased guarantee of above 60,000*l.*, uncalled capital, subscribed by 450 shareholders of the greatest respectability, and to raise the income derivable from premiums to 25,000*l.* per annum, while from the enlarged connection of shareholders, policyholders, and agents, a great accession of new business must be anticipated.

Your policy is now guaranteed by the English and Irish Church and University Assurance Society upon precisely the same conditions and provisions as it stood before, and I have the pleasure to forward you a formal certificate of guarantee which you can attach to the policy.

The saving of expense consequent upon this union will be beneficial to you by increasing the profits of the society and augmenting future bonuses. The directors, therefore, confidently claim your influence and co-operation in securing new business for the amalgamated societies. The magnitude of the income and share capital cannot fail to impart the utmost confidence in the stability of the undertaking, and render any efforts on your part for extending its operation both easy and successful.—I am, Sir, your obedient servant,

RICHARD HODSON, Secretary.

Householders' and General Life Assurance Company.
15 and 16, Adam-street, Adelphi, London,
September, 1858.

SIR,—I have much pleasure in communicating to you as an agent of this society, the union which has been effected between the Householders', Engineers' and Age, and English and Irish Church and University Assurance Societies. These amalgamations have been carried out with the full sanction and approval of the shareholders of the several companies.

The business of the united societies will be conducted at the above address, 345, Strand, the name and title being "The English and Irish Church and University Assurance Society, with which is united the Engineers', Householders' and Age."

Among the leading advantages to arise from this union may be mentioned: First, the increase of income from premiums which will now fall little short of £25,000 per annum; secondly, the addition of more than 400 highly respectable names to our list of shareholders, thereby augmenting the uncalled capital of the company to 60,000*l.*; and thirdly, the reduction of expenditure, as compared with the income the since business of the four companies can be managed at little more than was formally the cost of one.

It is quite manifest that this amalgamation of interests will greatly strengthen the hands of every one who has hitherto been acting as an agent for either of the societies, and give him the strongest claims upon public attention, and support in his efforts to procure new policies.

The directors confidently rely upon your disseminating a knowledge of the fore-mentioned advantages, and they do not doubt that the result will be a large influx of new business, beneficial alike to the society and to yourself.—I am, Sir, your obedient servant,

RICHARD HODSON, Secretary.

P.S.—I enclose you a printed list of the directors and officers of the united companies. Pending the issue of new forms, those in your possession can be used.

The following was the certificate:—

English and Irish Church and University Life Assurance Society, with which are united the Engineers', Householders', and Age Assurance Companies.
Head Office, 345, Strand, London, W.C.
Chairman, W. F. Dobson, Esq., M.A.
Deputy-Chairman, Rev. J. E. Cox, M.A.
Trustees:

The Right Hon. The Earl of Yarborough (Lord Lieut. of Lincolnshire).

The Rev. John Edmund Cox, M.A., F.S.A., St. Helen's, Bishopsgate.

T. W. Booker Blakemore, Esq., M.P. for Herefordshire.

Capital, 100,000*l.*

We, three of the directors of the English and Irish Church and University Life Assurance Society, hereby certify that the whole of life policy 148, on the life of yourself and Elizabeth T. Smith, for one hundred pounds, issued by the Householders' and General Life Assurance Company, and bearing date the 20th October, 1852, is guaranteed by the said English and Irish Church and University Life Assurance Society, and that the sum assured by the policy will be paid out of the funds of the said society, subject to the conditions and provisions contained in the original policy.

Dated this 16th September, 1858.

JOHN EDMUND COX,
AUGUSTUS G. HOW,
RICHARD WHITTINGTON, } Directors.
ANTHONY PECK, Secretary.

On the amalgamation of the English and Irish Church Company with the British Nation Association, Mr. Smith received the following circular:—

The English and Irish Church and University Life Assurance Society,
345, Strand, London, W.C.
July, 1861.

DEAR SIR,—The shareholders of this society, on the recommendation of the directors, and after very mature deliberation, have decided to accept an offer made by another association to unite the business of the two companies. In adopting this course, the directors feel that they are consulting the interests of all parties in their institution, and that they will receive larger prospective advantages to the policyholders than could have been, under the best auspices, obtained in a separate condition.

This union, which took effect from midnight of the 30th June last, has been made with the British Nation Life Assurance Association, of 291, Regent-street, and it is intended to carry on the joint business at their offices.

The terms and conditions contained in the policies issued by this company will remain, in any case, unaltered by this arrangement. The policyholders and annuitants are fully guaranteed for all claims under their present policies by the British Nation under the deed between the two companies, but any of the assured desiring it, can have an indorsement to that effect made on their policies. All communications should henceforth be addressed to, and all premiums due on and after the 1st day of July instant, paid to the receipt of Henry Lake, Esq., manager of the British Nation Life Assurance Association, 291, Regent-street, London.

Should you, however, have been accustomed to pay your renewal premium through an agent, you will be enabled to do so, as arrangements are made to enable the existing agents of the English and Irish Church Society to act for the British Nation Company.

The report of the British Nation for 1860-61 just issued shows the following:

12,020 policies in force, assuring	£3,105,691
Annual premium income	107,037
Invested funds and property	233,164
Annual revenue thereon	10,633

The annual income, therefore, of the British Nation, as shown by its last annual report, was 117,670*l.*

This most satisfactory position is now still further improved by the union of this and another company, and the income of the British Nation is now raised to nearly 150,000*l.* per annum.

The great advantages of the amalgamation of companies are now being thoroughly recognised, and appreciated by the public. They may be summed up briefly in this, the union of companies increases business, income, security, and bonus, and decreases expenditure, competition, and the liability to fluctuation. The business of two companies can be conducted in one office and by one staff without material additions, and the whole of the saving goes to improve the prospects of a large bonus.

I feel assured, therefore, that you will perceive at once the advantages which this union will secure to the policyholders of this society.

All the assured will not only have the security of the large annual income of the joint business, but it has

been arranged that in all future bonuses they shall participate on an equality with the other policyholders in the conjoint companies. They will thus secure not only all the benefits to which they were entitled in this society, but the additional benefits to be derived from the accumulation of income and power.

The directors feel that in the step they have taken they have considered the best interests of the assured, and have secured for them increased and permanent advantages.—I am, dear Sir, yours very faithfully,

W. F. DOBSON, Chairman.

British Nation Life Assurance Association,
Chief Offices, 291, Regent-street, W.,
London, July 13, 1861.

DEAR SIR,—It is announced to you by the accompanying letter of the Chairman of the English and Irish Church and University Life Assurance Society, that an arrangement has been concluded for the union of that society with this association.

Under the deed made between the British Nation and the English and Irish Church Society, it is not necessary for us to trouble policyholders to send their policies for indorsement by this association. Should you, however, wish it, if you will forward your policy, either direct or through the agent in your district, it shall be immediately (after the succeeding Thursday) returned to you endorsed, signed by three directors, and sealed with the seal of this association. But it is necessary for me to inform you that all policyholders are perfectly secure under the renewal receipts, and that the terms and conditions contained in the policies issued by the English and Irish Church Society remain unaltered by the transfer.

The subscribed capital of this association is considerably more than 200,000*l.*; the annual income is 146,000*l.*, and the invested funds (irrespective of capital) are upwards of 233,000*l.* The income from new business is now at the rate of 15,000*l.* per annum.

Whether regarded for the annual income or for the great amount of new business so far surpassing the majority of successful offices, the position of this institution is most gratifying. The distinctive principles which render it thus popular are set forth in the prospectus, copies of which, with proposal papers, &c., will be forwarded upon application to me, and I would invite your special attention to the following:

1. The application of the profits to rendering the policy payable during the lifetime of the assured.

2. The avoidance of all uncertainty or litigation by making policies indisputable.

3. The assistance granted to an assurer in the payment of his premium, thus averting the chance of losing the benefit of the policy by forfeiture through inability to pay the premium.

These truly popular features constitute a valid reason why an assurer should choose to take a policy of this association.

Your position as a policyholder, I need scarcely remark, will be greatly improved by the arrangements now made. By the union of interests, and by the conduct of the joint business in one office, and by one official staff, a very considerable reduction of expenditure will be effected, which must add coneiderably to the bonus, while the rate of new business, large as it is at the present time, will be greatly accelerated by the concentration of interests and income. It may also be gratifying for you to know that the British Nation and the companies united with it, have paid more than 2084 claims to policyholders, amounting with bonus additions to upwards of one million, one hundred and fifty-four thousand, six hundred and twenty-nine pounds sterling.

Allow me, therefore, to express the hope that you will as a policyholder, do all in your power to uphold and increase the business, by reverting to the subject of assurance among your friends, and (if it be not inconvenient to you) by rendering aid, by introductions and otherwise, to the agents in your district. You will thereby be, not only promoting the general prosperity of the institution, but by thus adding to the profit fund you will be increasing the value of your own policy.—I am, dear Sir, faithfully yours,

HENRY LAKE, Manager.

It did not appear whether Mr. Smith received the circular announcing the amalgamation of the British Nation Association with the European Society.

With regard to the premiums, down to 1858 Mr. Smith paid them to the Householders' Company, the policy being called in the receipts "Policy No. 1489." From that time to June 1861, he paid them to the English and Irish Church Company and accepted the receipts from them as follows:—

No. 1442. Policy, No. 149.

English and Irish Church and University Assurance Society, with which are united the Engineers', Householders', and Age Assurances Companies.

345, Strand, London, W.C.

Received, this 29th day of April, 1859, from Mr. Benjamin Smith, the sum of pounds, nineteen shillings and fourpence, being the half-yearly premium for the assurance of the sum of 50*l.*, upon the life of yourself and E. Smith, agreeably to the terms of a policy numbered as above, and due on the 13th day of April, 1859.

G. NEWMAN, } Directors.
AUGUSTUS G. HOW, }

Premium	0	19	4
Interest	0	0	0
	£0	19	4

Thenceforward to March 1865 he paid his premiums to the British Nation Association, and accepted receipts from them in the following form:—

British Nation Life Assurance Association, with which is united the business of the English and Irish Church and University Assurance Society.

Chief Offices, 291, Regent-street, London.

Receipt No. 5564.
Policy No. 148 H. Sum assured 100*l.*
9th November, 1861.

Received of Mr. B. Smith, the sum of one pound, eighteen shillings, and eightpence, being the payment of half-yearly premium from the 13th day of October, 1861, to the 12th day of April, 1862, for an assurance of the sum of 100*l.* on the life of himself and wife, effected by the before-named policy.

£1 18*s.* 8*d.* HENRY LAKE, Manager.
Countersigned, M. MADDEN, Cashier.

Subsequently he paid the premiums to the European Society, and accepted receipts from them as follows:—

European Assurance Society,
Empowered by Special Act of Parliament,
Chief Office: 316, Regent-street, London, W.

Receipt, No. 13,118 B. Agency C. O.
Policy, No. 146 H. Sum assured, 50*l.*

Received this 27th day of April, 1867, the sum of pounds, nineteen shillings, and fourpence, being the payment of six months' premiums from the 13th of April, 1867, for an insurance on the life of B. and E. T. Smith, effected by the beforenamed policy.

R. NORTON, } Directors.
£0 19*s.* 4*d.* WM. JONES, }
Countersigned, J. R. WALKER.

Printed receipts for renewal premiums issued from the chief office will alone be admitted as valid.

In May 1863 reversionary bonuses of 2*l.* 8*s.* and 1*l.* 4*s.* respectively were declared by the British Nation Association on the two policies, and circulars of the following form were received by Mr. Smith:—

(Bonus Notice.)

British Nation Life Assurance Association,
Chief Offices: 316, Regent-street, London, W.

May, 1863.

Policy, No. 148 H. Sum assured, £107 4*s.* 0*d.*
Life of B. and E. T. Smith.

SIR,—I am instructed by the Board of Directors to announce to you that a valuation of the affairs of this association up to the 31st of March, 1862, has been completed, and that an allotment of bonus to that period has been made.

I have great pleasure in informing you that the reversionary sum added to the above policy, and pay-

able at death with the above-named amount assured, is 2*l.* 8*s.*

The business is rapidly increasing, and it is hoped that at each succeeding valuation, this very satisfactory bonus will be materially augmented.—I am, Sir, your obedient servant,

HENRY LAKE, Manager.

To Mr. B. Smith,
or to the person legally entitled to the policy.

Also in April 1867 the European Society declared bonuses of 2*l.* 6*s.* and 1*l.* 2*s.* respectively on the two policies, and circulars of the following form were received by Mr. Smith:—

(Bonus Notice.)

European Assurance Society, Empowered by Special Act of Parliament.
Chief Offices: 316, Regent-street, London, W.
April, 1867.

E.
B. C.
E. and J.
Policy No. 148 H.
Lives of B. and E. T. Smith.

I am instructed by the board of directors to announce to you that a valuation of the affairs of this society, up to the 31st of December, 1865, has been completed, and that an allotment of reversionary bonus to that period has been made.

I have great pleasure in informing you that the reversionary sum added to the above policy at this division, is 2*l.* 6*s.*

You will please attach this notice to the policy, as the official declaration of the bonus addition.

The business is still rapidly increasing and it is hoped that at each succeeding valuation the bonus will be materially augmented.—I am, yours faithfully,

To Mr. B. Smith, HENRY LAKE, Manager.
or the person legally entitled to the policy.

No notice was taken of these circulars by the policyholders.

In Sept. 1861, a petition was presented to the Court of Chancery by a contributory of the English and Irish Church Company for the winding-up of that Company, and on the 4th Nov. an order was made on the petition to wind-up the company under the provisions of the Joint Stock Companies' Acts 1848 and 1869, and the Joint Stock Companies' Winding-up Amendment Act, 1857. A form of advertisement for creditors of the company to come in and prove their debts was settled by the chief clerk in Nov. 1861, and was afterwards inserted in the *London Gazette* and other newspapers. Mr. Smith never sent any claim on his policies against the company. This winding-up of the company had never been completed.

On the 12th Jan. 1872, the European Society was ordered to be wound-up, and on the 18th Jan. 1872, it was resolved that the British Nation Association be wound-up voluntarily, and on the 19th July 1872, the voluntary winding-up was ordered to be continued under the supervision of the court.

By an order of the arbitrator, Mr. Arthur Pooley Onslow, a shareholder, and formerly a director of the Householders' Company, had liberty to attend the hearing of the case for the purpose of protecting the interests of the Householders' Company.

Mr. Smith now claimed to be entitled to prove on his policies against the Householders' Company; but the joint official liquidator, on the other hand, contended that there had been a novation, and that consequently the Householders' Company was released from all liability.

Napier Higgins, Q.C., for the official liquidator, contended that there had been a novation, relying on the knowledge conveyed by the circulars, on the payment of the premiums to the transferee companies, on the acceptance of receipts from them, on the effect of the bonuses having been in fact accepted, and on the fact that nothing was done by the policyholder in the winding-up of the English and Irish Church Society. They referred to

Holmes's case, Reilly's Albert Rep. 110;
Allen's case, Reilly's Albert Rep. 127; 16 S. J. 657;
Knox's case, Reilly's Albert Rep. 132; 16 S. J. 673;
Glazebrook's case, Reilly's Albert Rep. 135;
Blundell's case, *sup.* p. 39;
Rivaz's case, Reilly's Albert Rep. 104; 16 S. J. 590;
Kennedy's case, Reilly's Albert Rep. 5; 15 S. J. 729;
Andrew's case, Reilly's Albert Rep. 107; 16 S. J. 609;
Lancaster's case, Reilly's Albert Rep. 95; 15 S. J. 748;
Dale's case, Reilly's Albert Rep. 11; 15 S. J. 886;

Montague Cookson for Mr. Onslow.

Roberts for Mr. Smith.—There has been no novation. [Lord ROMILLY.—I think that the acts and proceedings with regard to the transferee companies, and the making of payments to them operates as a novation.] If anything was accepted by the policyholder it was not a new contract, it was a further and fresh guarantee or indemnity. There was no substitution There may have been something additional. The amalgamation circulars conclusively show what was offered. The circular sent on the transfer of the Householders' Company's business says, "The effect of this amalgamation will be to give you the increased guarantee of above 60,000*l.* uncalled capital subscribed by 450 shareholders of the greatest respectability, and to raise the income derivable from premiums to 25,000*l.* per annum, while from the enlarged connection of shareholders, policyholders, and agents, a great accession of new business must be anticipated. . . . . Your policy is now guaranteed by the English and Irish Church and University Assurance Society upon precisely the same conditions and provisions as before." And the circular sent on the transfer of the English and Irish Society's business says:—"The terms and conditions contained in the policies issued by this company will remain in any case unaltered by this arrangement. The policyholders and annuitants are fully guaranteed for all claims under their present policies by the British Nation under the deed between the two companies, but any of the assured desiring it can have an endorsement to that effect made on their policies. All the assured will not only have the security of the large annual income of the joint business, but it has been arranged that in all future bonuses they shall participate on an equality with the other policyholders in the conjoint companies. They will thus secure not only all the benefits to which they were entitled in this society, but the additional benefits to be derived from the accumulation of income and power." The mere payment of premiums has been held by the Lords Justices not to operate as a novation: (*Griffith's case*, 26 L. T. Rep. N. S. 780; L. Rep. 6 Ch. 374.) And with regard to the bonuses, Mr. Smith merely received the circulars announcing them. He never took any notice of them, therefore it cannot be said that he accepted the bonuses. You cannot be said to have assented to a notice unless you have done something to signify your assent. This distinguishes our case from *Spencer's case* (L. Rep. 6, Ch. 362), where something was done to assent to the bonus. This case, moreover, is different from

Talbot's case (*sup.* p. 172), decided by your Lordship; where there was an indorsement on the policy. Here there is no indorsement. Our claim is certainly good, if Lord Westbury's decision and *dicta* are followed. If Lord Cairns's decisions are to be followed, we admit at once that they are opposed to our claim. [Lord Romilly.—In *Talbot's* case I decided that Lord Cairns's decisions are to be followed.]

Lord Romilly.—

I think there is novation here. The case comes exactly within *Talbot's* case, which I decided after a great deal of consideration, feeling the great responsibility that was upon me in deciding between the different views of Lord Westbury on the one hand, and those of Lord Cairns on the other. I decided that I must follow Lord Cairns instead of Lord Westbury, and having so decided after the fullest consideration, I must adhere to my decision in future cases.

Glanfield's Case.

This case was decided on the 15th June before *Benjamin Smith's* case. The facts were the same, except that after the amalgamation of the English and Irish Church Society with the British Nation Association, the policyholder had, on receiving the amalgamation circulars, sent in his policy on the 27th Aug. 1861, to the British Nation Association, which had thereupon returned it to him with the following indorsement placed upon it:—

In consideration of the within named assured having agreed to the transfer of the within written policy to the British Nation Life Assurance Association, and to pay to the said association all future premiums on the same policy as they become due, and to observe and perform all the stipulations contained in the said policy on the part of the said assured, the said association doth hereby agree to observe and perform all the stipulations contained in the same policy on the part of the English and Irish Church and University Assurance Society, and in the stead of the said English and Irish Church and University Assurance Society.

Provided always that this policy shall be subject to the provisions of the deed or deeds of settlement of the British Nation Life Assurance Association, and that the subscribed capital for the time being of the said association, and other the funds and property of the said association remaining at the time of any claim made undisposed of and inapplicable to prior claims in pursuance of the provisions of the deed or deeds of settlement of the said association shall alone be liable to answer all claims of the said association in respect of this policy and of all other policies, and that no director or other proprietor of the said association, his heirs, executors, and administrators, shall by reason of any policy of assurance, or guarantee, or instrument, securing an annuity or annuities, or of the whole of the policies of assurance and guarantees, and instruments securing annuities, taken together, which any director or directors have or hath signed or may sign, or upon that or any other account be in anywise individually liable to any claims against the said association beyond the amount of the unpaid part (if any) of his particular share or shares in the subscribed capital of the said association.

In witness, &c.,

Jas. Fuenell, Robt. Norton, G. F. Anderson, } Directors of the British Nation Life Assurance Association.

Millar for Mr. Glanfield (after using similar arguments to those used in *Benjamin Smith's* case, and dwelling on the importance of adhering to Lord Westbury's decisions), said, with reference to the indorsement, this was placed on it by the British Nation Association. There was no indorsement by or contract with the intermediate company, the English and Irish Church Society. The indorsement by the British Nation was that they undertook the stipulations of the English and Irish Church Society. If there was no contract with that Society, the indorsement could not create one with the British Nation.

Napier Higgins, Q.C., for the joint official liquidator; *Montague Cookson* for Mr. Onslow.

Lord Romilly.—

I think there is novation in this case. Lord Cairns's judgments exactly apply to this particular case. The British Nation Association having adopted the policy, and having acted upon it by the desire of the person himself, as is set out at full length in the case, that binds all those who have acted upon it.

Solicitors for Mr. Benjamin Smith, *Smith, Fawdon* and *Low*.

Solicitors for Mr. Glanfield, *Rooks, Kenrick* and *Co.*

Solicitors for Mr. Onslow, *Wordsworth, Blake, Harris* and *Parson*.

Solicitors for the joint official liquidator, *Mercer* and *Mercer*.

Wednesday, July 8, 1874.

Cooper's Case.

Insurance company—Winding-up—Reserve fund—Certain guarantee policies not comprised in the company's Act of Parliament.

Under the Act of Parliament of an insurance company, any court or any qualified officer of a court might accept the security of the company in lieu of any security required of any person appointed to any office established or recognised by Act of Parliament, or who by virtue of any Act or any order made in pursuance of such Act is required to give security. These security policies were to be paid out of a certain reserve fund set apart by the company.

In a Chancery suit C. was appointed a receiver, the following being the note of the chief clerk:—"It is agreed that C. should be appointed receiver, on understanding that A. and B. shall act as his agents, they giving him security. This is to form no part of the order." The insurance company granted a guarantee policy, guaranteeing the honesty of A., who subsequently absconded.

In the winding-up of the company, C. claimed on the policy against the reserved fund, contending that A. had been appointed by what was practically an order of the court; and that, accordingly, the policy came within the provisions of the Act of Parliament:

Held, that C. could claim only against the general assets of the company, the policy not being comprised in the Act.

This was a claim on a policy against the European Society's Reserve Fund.

In 1867, a suit was instituted between the General Exchange Bank and the General Provident Assurance Company, the object of which was to realise certain mortgage securities to the extent of about 60,000*l.*, which were assets of the plaintiff company, subject to an equity of redemption in the defendant company. In this suit Mr. Cooper, one of the liquidators of the plaintiff company, was appointed receiver; the following entry being made by the chief clerk on the appointment:

General Exchange Bank v. *General Provident Assurance Company.*

Appeared both.

It is agreed that Mr. Cooper should be appointed receiver, on understanding that the two principal agents

of the defendant company should act as his agents, they giving him security.

This is to form no part of the order.

Order to appoint James Cooper, receiver, on giving security—two sureties, 1000*l.* each.

Cooper appointed Mowatt his agent for collecting the periodical instalments payable on the mortgages in Ireland. A guarantee policy was effected with the European Assurance Society in the name of Cooper, whereby the society had agreed to make good to the assured to the extent of 500*l.* any loss which might be sustained by reason of the criminal fraud or dishonesty of Mowatt in his employment.

Mowatt subsequently became a defaulter to the extent of 227*l.* 14*s.*, and absconded. Cooper, as receiver, claimed on the guarantee policy against the European Society's reserve fund, the society having become insolvent and having been ordered to be wound-up.

The official liquidator opposed the claim, on the ground that the policy was not one of those contemplated by the society's Act of Parliament in its provisions with reference to the reserve fund.

The following were some of these provisions:

Sect. 10:

After the commencement of this Act, the Lord High Treasurer, or the Commissioners of Her Majesty's Treasury, or any three or more of them, or any of Her Majesty's principal Secretaries of State, or the principal officer or officers of any public office or department of the State, or any other Government or public functionary, or any court, by or under whom or in which any person is already or hereafter appointed to any office or employment established or recognised by Act of Parliament, and who, by virtue of any Act from time to time in force, or any order or regulation made in pursuance of any such Act, is already or thereafter required to give security in respect of such office or employment, may, if he or they think fit, accept, instead of the security so required, the guarantee or security of the society, to be given by their bond or policy in the usual form thereof, or in such other form, and subject to such conditions as the Lord High Treasurer, or Commissioners, Secretary of State, or principal officer or officers, or functionary, or court from time to time require or approve, and the same, when so accepted and given, shall be instead of the security so required.

Sect. 16:

For the purposes of this Act the following expressions and words have respectively the following meanings, that is to say: "Government" or "public functionary" extends to and includes the persons, if more than one, or the sole person, if but one, in whom the discretion from time to time resides, of determining upon the nature, value, amount, or sufficiency of the security to be given by or taken from the person from time to time holding or filling, or appointed to, any such office or employment, and extends to and includes the Masters in Chancery, Commissioners in Bankruptcy, Commissioners of Income and Property Tax, Copyhold Commissioners, the Inclosure Commissioners, the Police Commissioners, and all other Commissioners already or hereafter appointed under any Act of Parliament, and all turnpike trustees, local boards of health and all municipal and other corporations, and all bodies and persons acting, whether severally or collectively under any Acts of Parliament, charters, or deeds of settlement.

Sect. 18:

The society, before they issue any such bond or policy, shall set apart, out of the assets or income of the society, or out of both, sums to the amount in the whole of 20,000*l.*, to form a reserved fund; and the society shall, on or before the 1st May in the year next succeeding the formation of such reserved fund, and on or before the like day in every succeeding year, set apart out of their assets or income, or out of both, the sum of 2000*l.*, by way of addition to the reserved fund, until the reserved fund amounts to the sum of 100,000*l.*

Sect. 20:

The reserved fund shall be liable, after the assurance fund of the society is exhausted, but not before, to make good the guarantees or securities of the society, granted in pursuance of this Act, and for no other purpose; and all the sums from time to time taken from the reserved fund for the purpose of making good any such guarantees or securities, shall, so soon as possible, be replaced from the assets or income of the society, or both, so as to keep the reserved fund always up to the amount thereof required by this Act: and any sums from time to time appropriated or carried to the reserved fund, may be taken wholly or part from the proprietors' fund and the assurance fund of the society, or either of them, as the directors of the society shall think fit.

Locock Webb, for Cooper.—The society held themselves out as being authorised by this Act of Parliament to grant the guarantee policy; and the policy was distinctly, within the provisions of the Act of Parliament. Cooper was an officer of the court, so he appointed Mowatt his agent, with the sanction of the court. The sum named by the policy is accordingly payable out of the reserve fund.

Napier Higgins, Q.C., and *Montague Cookson*, for the official liquidators of the European Society, were not called upon.

Lord Romilly said that the court had not ordered Mr. Mowatt to give security; and that the claim must be refused with costs, the policy not being one of those contemplated by the Act of Parliament.

Solicitors for Mr. Cooper, *Lawrance*, *Plews*, *Boyer*, and *Baker*.

Solicitors for the Official Liquidator of the European Society, *Mercer* and *Mercer*.

Monday, Aug. 3, 1874.

Bath Hospital's Case.

Insurance company—Winding-up—Reserve fund—Certain guarantee policies not comprised in the company's Act of Parliament—Bath Hospital not a "public functionary."

An insurance company's Act of Parliament provided that a Secretary of State, &c., or any other Government or "public functionary," by or under whom any officer was appointed to any office established or recognised by Act of Parliament, might accept the guarantee of the company in respect of the office in lieu of any security required of the officer; and the term "public functionary" was to include commissioners appointed under any Act of Parliament, &c., local boards of health, and "all municipal and other corporations, and all bodies and persons acting, whether severally or collectively, under any Acts of Parliament, charters, or deeds of settlement." A certain reserve fund was to be set apart for the payment of these guarantee policies granted under the Act of Parliament.

The insurance company granted a guarantee policy to the Bath Hospital, which was managed by trustees under a trust deed:

Held, in the winding-up of the company, that the hospital was not a "public functionary," so as to entitle them to claim against the reserve fund.

This was a claim against the European Assurance Society's Reserve Fund.

The Royal United Hospital of Bath was an institution largely supported by voluntary contributions, and managed by certain trustees, who

were from time to time appointed under a trust deed of the 27th Sept. 1834, by which it was declared that certain property was held by the trustees for the benefit of the poor inhabitants of Bath requiring medical or surgical relief.

Edward Miller was in 1868 appointed by the trustees to the office of secretary and house steward, or master of the hospital. And in Nov. 1868, the trustees effected a policy with the European Society, guaranteeing the hospital against any loss that might be sustained in consequence of the dishonesty of Miller.

Miller subsequently absconded, after having applied 127*l.* 12*s.* 4*d.* dishonestly to his own use.

In the winding-up of the European Society in 1872, the trustees of the hospital claimed to be paid on their policy out of the reserve fund of the society, which had been set apart for the payment of the guarantee policies issued under the society's Act of Parliament: (See the provision of the society's Act with respect to the reserve fund.)

This claim was opposed by the official liquidator, on the ground that the policy was not one of those contemplated by the Act.

H. M. Jackson, Q. C. and *Medd*, for the Bath Hospital.—The policy comes within the provision of the Act. The hospital is a "public functionary" under sect. 16. It certainly is a "body acting collectively under a deed of settlement." Sect. 10 authorises such a public functionary to obtain a guarantee policy. The language of that section is peculiar; but in giving it any other interpretation you would be saying that the Lord High Treasurer and the Secretaries of State are in certain cases to give security. This, of course, cannot be meant. Having taken the policy under sect. 16, the hospital is entitled to the benefit of it under sect. 20.

Napier Higgins, Q.C. and *Montague Cookson*, for the official liquidator.—The hospital is not a "public functionary," so as to be entitled to a guarantee policy to be paid out of the reserve fund. And whether they are a "public functionary" or not, they are not required by any Act of Parliament to obtain this kind of security.

Lord ROMILLY—

What is contended for appears to me distinctly excluded by the Act of Parliament. I have read through the Act very carefully, and it appears to me that in every point of view the Bath Hospital is not a "public functionary," in the proper sense of the term. If the Act of Parliament is so drawn that it requires things that no person ever knew or heard of, such as if the Lord Chancellor were required to do this, it must be taken in the best sense that can be put on it, namely, that it is not meant to be personally done by him; it is to be taken by his officers. I am of opinion that the hospital is not a public "functionary" within the meaning of the Act.

Solicitors for the Bath Hospital, *Young, Maples, Teesdale, Nelson*, and *Co.*

Solicitors for the Official Liquidator, *Mercer* and *Mercer.*